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Supreme Court, U.S.
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Case No. 92-

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1992

JOHN MUSSER, Petitioner,

v.

PASADENA UNIFIED SCHOOL DISTRICT,
CALIFORNIA STATE BOARD OF EDUCATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

CLIFTON S. SMITH, JR.
Attorney for Petitioner,
John Musser
STANWOOD SMITH - LAWYERS
611 West Sixth Street
20th Floor
Los Angeles, California 90017
(213) 623-1059

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(213) 623-1059

QUESTIONS PRESENTED

Whether the decision of the California Court of Appeal violated petitioner John Musser's right to equal protection of the laws by holding that a ratification election (the final step under a California statutory "citizens' petition" process) to ratify the transfer of school district territory containing 71 homes with one (1) student out of the 21,600-student Pasadena Unified School District must, under the equal protection clauses of the United States Constitution and the California State Constitution [U.S. Const. Amend. XIV; Calif. Const. art. I, section 7], include all 109,000 electors of the PUSD where no discernible rights, duties, obligations, privileges of the 109,000 are affected?

Whether the determination of the California State Board of Education to authorize only the voters within the

territory to be transferred to vote in the "ratification election," a determination made under California Education Code Section 35756, is constitutional under the Equal Protection Clauses of the United States and California Constitutions as applied?

Whether, in order to satisfy the Equal Protection Clauses of the United States Constitution, all voters physically resident within a particular political subdivision of a state must vote in all elections on all matters touching any of the residents of that particular subdivision, regardless of the lack of any demonstrable link between the interests affected by the outcome of such an election and the voters themselves?

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OPINIONS BELOW

The opinion of the California Court of Appeals is reported at 9 Cal.App.4th 767 (1991) and appears as Appendix A to this Petition. The California Supreme Court's order dismissing petitioner's Petition for Review to that Court appears as Appendix B to this Petition.

JURISDICTION

The California Supreme Court entered its order dismissing its previously-granted review of the case below on December 17, 1992. The California Court of Appeal declared its decision below final on January 14, 1993. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Section 1257(a).

STATEMENT OF THE CASE

The California Court of Appeal (the "Court of Appeal") ruled that John Musser and the other 125 voters of a tiny slice of unincorporated Los Angeles County territory cannot complete their three-year trek to transfer their three blocks from the huge and distant Pasadena Unified School District ("PUSD") (which none of their children now attend or have attended for many years) to the closer and adjacent San Marino Unified School District ("SMUSD"). Now, in order to satisfy

the Court of Appeal's interpretation of the United States and California Constitution's equal protection provisions, all 109,000 voters in the PUSD must vote on the transfer. The Court of Appeal identified certain "interests" allegedly affected by the proposed transfer. The Court of Appeal pointedly fails to show any demonstrable link between those "interests" and the outcome of this territory transfer.

California law permits the reorganization of school districts by "Petitions by the Electorate." California Education Code Sections 35700 - 35766, attached as Appendix C hereto. As can be seen fror these statutes, particularly Education Code Section 35753, a petition must meet extensive and exacting criteria even to be considered.

A petition must contain valid signatures of 25% of the electors in a proposed territory to be transferred. Then, the local "Committee on School District Organization," a body elected by all the school districts in the

County, holds hearings and makes findings of fact. The procedure applicable at the time the Musser Petition was considered[1] provided for the local Committee to make a non-binding recommendation to the State Board of Education regarding granting or denying the petition. The State Board then heard and determined all such petitions.

In this case, Mr. Musser gathered signatures, enlisted the help of neighbors, presented his case before four local hearings and four hearings at the State Board of Education.

The State Board of Education, after its hearings, made multiple findings of fact (all of which have been sustained on appeal and are final), and reams of testimony and evidence, ruled that the Musser petition met <u>all</u> of the exacting criteria for a transfer and ordered an

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[1]The California legislature modified this procedure somewhat in 1991 by vesting more authority in the local Committee on School District Organization.

election to ratify the proposed transfer. Education Code Section 35756 requires the State Board to determine the election territory. The State Board limited the election to the transfer territory itself, finding on advice of counsel that other voters of the PUSD and SMUSD had no substantial interest in the outcome of the election.

The election was held. The transfer was ratified. The PUSD filed suit to set aside the election and the order calling the election. The Los Angeles Superior Court found that the State Board's limitation of the election territory survived under the "rational basis" test because no interests of the non-transfer territory voters were affected. Applying common sense and not the heated rhetoric of civil rights cases, the Superior Court held that legally disinterested voters had no constitutional right to vote in an election, the outcome of which had no measurable impact on them.

The Court of Appeal ruled otherwise. (A concise history of the case is found in the first pages of the Court of Appeal Decision.)

The Court of Appeal Decision

The Court of Appeal Decision (Appendix A hereto) upheld all findings of the State Board of Education (including the finding that the transfer would not "promote racial or ethnic discrimination or segregation") but overturned the transfer on equal protection grounds, holding that the limitation of the election territory to the 126 electors violated the right of the other 109,000 electors to vote. Although acknowledging that PUSD conceded the absence of any financial, curricular, physical or educational impact on the PUSD, the Court of Appeal identified only the following as "affected interests" of the 109,000 PUSD voters: morale and racial impact. The Court of Appeal never said what it meant by "morale," or whose morale it was protecting. Nor did it

explain how the transfer of one minority student from the 78%+ minority PUSD to the 50%+ minority SMUSD would have any demonstrable impact on racial balance. The Court of Appeal's holding on the alleged racial "impact" of this proposed transfer destroys the idea of any threshold required for a Court to act, in direct contravention of this Court's decision in Board of Education v. Dowell, 111 S.Ct. 630 (1991). The Court of Appeal simply threw out any requirement that there be consequences to an official act. Consequences are now either presumed or irrelevant.

California Supreme Court's Recent Decision on Point

On November 9, 1992, the California Supreme Court issued its decision in Board of Supervisors v. Local Agency Formation Commission, 3 Cal.4th 903, -- Cal. Rptr. --, -- P.2d -- (1992), which dealt with the issue of election territory delineation. It expressly

held that the Legislature holds plenary power overs its political subdivisions:

> The mere fact, however, that a state law touches on the right to vote does not necessarily require the application of strict scrutiny. (Burdick v. Takusi, (1992) 504 U.S. ___) Rather, "the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process." (Choudry v. Free, (1976) 17 Cal.3d 660, 664, quoting Bullock v. Carter (1972) 405 U.S. 134, 144.) As we now undertake to explain by reviewing federal precedent, section 57103's [the code section analogous to Education Code Section 35756] impact in the case before us falls well short of the "real and appreciable," for

> individual interests in voting are much attenuated by the state's plenary power to oversee and regulate the formation of its political subdivision, and the same power entitles the state to identify as differing in degree the interests of those who may vote . . . and those who may not.
>
> Board of Supervisors v. Local Agency Formation Commission, supra, 3 Cal.4th at 914.

Petitioner is at a loss to understand why their own Supreme Court first granted review, upheld the determination of a local agency to limit an election territory, then dismissed its review of this case on virtually identical facts and logically indistinguishable statutory schemes.

The interests of the non-transferees here are much more "attenuated" than those at stake in Board of Supervisors. How, then, can these

109,000 get to vote on a matter which impacts only Musser and his neighbors? They cannot without destroying Musser's right to vote.

The complete and total absence of any identifiable, cognizable interest of the 109,000 voters of the PUSD in the outcome of Musser's transfer ratification election compels this Court to overturn the Court of Appeal's decision. If not, John Musser and his neighbors have no right to vote. Lockport v. Citizens for Community Action, 430 U.S. 259, 41 L.Ed.2d 313, 97 S.Ct. 1047 (1977).

CONCLUSION

The California State Legislature empowered the California State Board of Education to act upon citizens' petitions to reorganize school districts. That power is severely constrained by the Legislature's extensive statutory requirements which all such petitions must meet. Only after these Herculean requirements are met, may the State Board even consider a transfer election. If it approves the

transfer, the matter is then submitted to the affected voters.

The Legislature also empowered the State Board to determine who would vote. In this case, the State Board authorized only those voters whose interests are affected to vote. The Court of Appeal says everyone gets to vote, whether affected or not. That decision is wrong, and it deprives John Musser of his right to vote as guaranteed by the equal protection provisions of the United States Constitution.

This Court should, accordingly, grant this Petition for Writ of Certiorari to vindicate Mr. Musser's right to vote.

March 16, 1993

Respectfully submitted,

STANWOOD SMITH - LAWYERS
CLIFTON S. SMITH, JR.
611 West Sixth Street, 20th Floor
Los Angeles, California 90017
(213) 623-1059

by _____
Clifton S. Smith, Jr.
(Admitted to practice before this Court October 18, 1982)

[No. B056556. Second Dist., Div. Two. Feb. 6, 1992.]

PASADENA UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. STATE BOARD OF EDUCATION, Defendant and Respondent; JOHN MUSSER, Real Party in Interest and Respondent.

[**Reprinted without change to permit tracking pending disposition on review by the Supreme Court** (See Preface to Cumulative Subsequent History Table. Previous cite 3 Cal.App.4th 455.)]

OPINION

GATES, Acting P.J.--In the instant proceeding Pasadena Unified School District challenged the decisions of respondent State Board of Education (State Board) (1) approving a transfer of territory from Pasadena Unified School District to San Marino Unified School District; and (2) directing that the proposal be submitted for approval in an election limited exclusively to the residents of the territory wishing to be transferred. When its petition for writ of mandate was denied, this appeal followed. Three assignments of error are made:

"I. Respondent abused its discretion in granting a rehearsing on the same petition it previously denied. II. Respondent's decision to approve the transfer is contrary to law, arbitrary, capricious, and entirely lacking in evidentiary support. A. Approval of the petition to transfer will promote racial and ethnic segregation in the Pasadena Unified School District. B. Approval of the petition to transfer would result in a significant financial fain to the petitioning homeowners. III. Limitation of the election to the voters in the are proposed for transfer is a violation of equal protection guarantees."

The parties agree that in reviewing the State Board's approval of the petition for transfer, this court is limited to determining from an examination of the proceedings before the agency whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. (Pitt v. Perluss (1962) 58 Cal.2d 824, 833 [27 Cal.Rptr. 19, 377 P.2d 83].)

Section 35753 of the Education Code, in effect at the time, required that the reorganization in issue substantially meet the following conditions: "(1) That the new districts will be adequate in terms of number of pupils enrolled. [¶] (2) That the districts are each organized on the basis of a substantial community identity. [¶] (3) That the proposal will result in an equitable division of property and facilities of the original district or districts. [¶] (4) That the reorganization of the districts will not promote racial or ethnic discrimination or segregation. [¶] (5) The proposed reorganization will not result in any substantial increase in costs to the state. [¶] (7) Such other criteria as the board may, by regulation, prescribe." (Ed. Code, § 35753, subd. (a) (Stats. 1980, ch. 1192, § 3), subsequently amended (Stats. 1990, ch. 1658, § 8).)

The record reveals that certain persons

residing in a portion of that unincorporated area of Los Angeles County which is adjacent to both the cities of Pasadena and San Marino (the Greenwood Addition) petitioned for a change of school district boundaries. In effect, they wished to secede from Pasadena Unified School District which had served that area for more than half a century and join San Marino Unified School District. Substantially the same group also filed a petition with the local agency formation commission for annexation of the area to the City of San Marino.

Pasadena opposed the reorganization petition, primarily on the ground the a racial imbalance in its schools would be worsened by such a transfer, and the approval would create a precedent that would undermine its long-standing efforts, previously court mandated, to maintain an integrated student body.

The Los Angeles County Committee on School District Organization (the County Committee) held public hearings in both affected districts

and received data regarding the proposed action.

The 21.5-acre Greenwood Addition contained approximately 71 homes, and 126 voters. It had a combined total of forty-seven school-aged children, of whom approximately 70 percent were White, one Asian, currently attended private schools. However, presumably many of these children would attend public school if the desired transfer were accomplished.

Pasadena Unified School District's student body included approximately 21,600 students, of whom approximately 39 percent were Black, 35 percent Hispanic, 21 percent White, and 5 percent Asian and others. Over the past 20 years its percentage o White students had steadily declined. The federal district court's continuing jurisdiction over Pasadena Unified School District's desegregation efforts was relinquished in 1979. (See Spangler v. Pasadena City Bd. of Ed. (9th Cir. 1979) 611 F.2D 1239.) Its voters numbered 109,000.

Of the approximately 2,700 students enrolled in the San Marino Unified School District 57 percent were White, 39 percent Asian, 3 percent Hispanic, and 1 percent Black and other. The district, which encompassed 12,812 voters, had experienced a consistent decline in enrollment over the preceding 10 years that had resulted in budgetary shortfalls.

On November 1, 1989, the County Committee voted not to recommend the approval of the petition to respondent State Board, reasoning that although the petition appeared to meet the relevant criteria, there was no compelling reason to approve the transfer of such a small number of students, particularly when the area might soon be annexed to the City of San Marino.[1] Further, the committee recommended

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[1]Pasadena Unified School District represented during the reorganization proceeding that it would not oppose the transfer were the annexation petition approved by San Marino.

that if an election became necessary, it should be held within the boundaries of both the Pasadena and San Marino Unified School Districts.

The petition came before the State board with the County Committee's recommendation of denial. In addition to that presented to the County Committee, the State Board received evidence that the transfer would increase the value of the homes within the Greenwood Addition. The estimates ranged from 10 percent to 40 percent of market value.

On June 7, 1990, the administrative committee of the State Board recommended approval of the petition by a vote of three to two, with three to one favoring limiting the election exclusively to the area proposed to be transferred. However, when the full State Board convened on June 8, 1990, one of the members of the administrative committee announced that she had originally voted in favor of approving the petition, but no longer

supported it. The State Board members unanimously voted to deny the petition.

Subsequently, on September 13, 1990, the administrative committee received additional evidence regarding the cost of the election, the decision of the then members of San Marino's School District to support the transfer, and the progress toward annexation of the area by San marino. They then voted to rehear the petition, which they recommended be approved. The State Board on the following day adopted that recommendation and, indeed, determined to restrict voting the election to decide the issue to only those voters residing in the Greenwood Addition, i.e., the very are requesting the transfer.

Although the City of San Marino rejected Greenwood Addition's petition for annexation, its school district ultimately determined to adopt a neutral position on this particular transfer. Of course, whether is willingness to be disenfranchised would have been the same,

had the ethnic and economic composition of the group seeking admission been different, is unknown.[2]

On March 1, 1991, appellant filed with this court a petition for writ of supersedeas requesting that we enjoin the election regarding transfer that had been fully prepared and was scheduled to be held only four days later on March 5, 1991. Although the result of that election appeared manifest, in accordance with customary judicial practice, we denied this 12th hour petition and, as anticipated, Greenwood Addition's request to transfer was approved by the Greenwood Addition's voters.

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[2]We were advised at oral argument that subsequent to the instant proceeding the voters of San Marino had elected new school district officers, allegedly, in part at least, because of this decision by its former officials. Consequently, San Marino may now wish to be included in the new election which will be required the board determines to proceed with this transfer following our decision.

(1) RESPONDENT DID NOT ABUSE ITS DISCRETION IN GRANTING A REHEARING

The State Board's interpretation of its own regulations[3] should be given great weight. Moreover, we interpret rules regarding rehearings broadly to encourage the correction of decisions reached on the basis of mistaken facts. Here, additional evidence was presented and the State Board properly could, as it did, grant the petition for rehearing.

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[3]Title 5, California Code of Regulation, section 18572, provides: "If the same or an essentially identical proposal or petition has been previously considered by the Board, the documents constituting such a resubmission shall be accompanies by a written summary of any new factual situations or facts not previously presented. In this case, the Board will entertain arguments not theretofore presented and hear expositions of new factual situations and of facts not previously brought to the Board's attention."

IT CANNOT BE SAID AS A MATTER OF LAW THAT THE STATE BOARD ABUSED ITS DISCRETION BY APPROVING THE TERRITORY TRANSFER PROPOSAL

Appellant contends the State Board erred in two respects: (1) in determining that the transfer would not "promote racial or ethnic discrimination or segregation" (Ed. Code § 35753, subd. (a)(4), Stats. 1980, ch. 1192), and (2) in failing to reject the proposal on the ground of a guideline prohibiting reorganizations which would cause significant increases in property value resulting in financial advantage to homeowners.

PROMOTION OF RACIAL SEGREGATION

(2) Our Supreme Court has stated that the statutory language "imposes on the State Board a more stringent obligation than its constitutional duty - a duty which would exist in the absence of section 4200 [now section 35753, subdivisions (a)(4)] - not to approve the creation of district with segregated schools. . . ." (Fullerton Joint Union High

School Dist. v. State Bd. of Education (19832) 32 Cal.3d 779, 792 (187 Cal.Rptr. 398, 654 P.2d 168].) Moreover, "[t]he State Board should also inquire into the effect of a secession Plan upon the ability of both the new district and the remaining portion of the original district to adapt to the present and anticipated racial and ethnic composition of its students, and to implement voluntary integration programs [citations]." (Id. at p. 793.)

(3) Here the proposed reorganization would carve out a small enclave which is 70 percent White from a predominantly minority district which has struggled for years with the problems of segregation, and transfer it to a largely White and affluent district. While we do not impugn the motives of those seeking to transfer, such action obviously promotes segregation, albeit of only a limited amount. (see Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]: "A racial imbalance may be

created or intensified in a particular school not only by requiring Negroes to attend it but also by providing different schools for white students who, because of proximity or convenience, would be required to attend it if boundaries were fixed on a nonracial basis." And see United States v. Scotland Neck Bd. of Educ. (1972 407 U.S. 484 [33 L.Ed.2d 75, 92 S.Ct. 2214]; Wright v. Council of City of Emporia (1972) 407 U.S. 451 [33 L.Ed.2d 51, 92 S.Ct.2196].)

The State Board, however, apparently concluded this effect would not be substantial because transferring the few potential students in the Greenwood Addition would have no detectable statistical impact on the total racial/ethnic composition of either school district. While we do not agree with that view of a transfer which might provide a blueprint for the flight of other predominately White neighborhoods, neither are we able to say the decision was necessarily arbitrary, capricious,

or without evidentiary support.

Although there are obvious factual differences, in certain respects this case is similar to Fullerton Joint Union High School Dist. v State Bd. of Educ., supra, 32 Cal.3d 779, in that it involves the requested secession of a small White enclave. That is, as our Supreme Court noted, the removal of a portion of the Fullerton district to form the Yorba Linda Unified School District might, in the future, make more difficult each district's adaptation to changing racial and ethnic populations. Nevertheless, the court refused to reverse the State Board on this issue because there was no evidence the reorganization itself would result in segregated schools: ". . . if we look to the present composition of the districts and dismiss future changes as speculative, we would not classify the State Boards's decision as arbitrary or capricious. . . ." (Id. at p. 794.)

However, what was merely a spectre haunting Yorba Linda and Fullerton's futures, is an existing plight which Pasadena has long endured. Nonetheless, if the residents of both the affected districts were to concur in the present proposed reorganization we would be reluctant to characterize the State Board's decision to recommend its implementation as arbitrary since it would not, per se, result in a significant change in the racial composition of either district.

FINANCIAL ADVANTAGE TO HOMEOWNERS

(4) Although its staff report does discuss the factor, noting that the transfer would result in significant financial gain in the transfer area, the State Board did not expressly address the issue of financial enrichment.

The proposed guideline to section 35753 of the Education Code, upon which Pasadena Unified School District relies, provides as follows: "(8) The proposed reorganization will not

result in a significant increase in property values causing financial advantage to property owners because territory was transferred from one school district to an adjoining district.: However, that proposal was not formally adopted. Similar language was subsequently codified in section 35753, subdivision (a)(8) of the Education Code, but that provision did not become effective until January 1, 1991, three months after the State Board decision.[4]

Even were we to assume the State Board should be held to a proposed guideline that had not been formally adopted (see Armisted v. State Personnel Board (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr 1, 583 P.2d 744]; Ligon v. State Personnel Bd. (1981) 123 Cal.App.3d 583, 588 [176 Cal.Rptr. 717]), Pasadena Unified

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[4]Subdivision (a)(8) provides: "The proposed reorganization is not primarily designed to result in a significant increase in property values causing financial advantage to property owners because territory was transferred from one school district to an adjoining district."

School District still has not shown the State Board acted arbitrarily, capriciously, or without evidentiary support. Contrary to earlier predictions, real party in interest presented evidence that the increase in property value would be at most 10 percent to 15 percent and that other reasons were of equal or greater force in motivating the transfer proposal. Therefore, the State Board could have concluded that the acknowledged financial advantage to property owners was not sufficiently significant to bar the transfer.

On this issue we would not substitute our judgment for that of the State Board, which has authority to make such determinations, after it has struggled with competing educational considerations throughout a lengthy administrative proceeding.

LIMITATION OF THE ELECTIONS TO THE VOTERS IN THE AREA PROPOSED FOR TRANSFER VIOLATES EQUAL PROTECTION GUARANTEES

The threshold question in reviewing the

State Board's voting area decision determines the applicable level of judicial review. (5) Our Supreme Court and the United States Supreme Court apply a two-level test.

In the typical equal protection setting the classification need only bear a rational relationship to a conceivable legitimate state purpose. However, in cases involving suspect classification or touching on a "fundamental interest," the classification must be subjected to strict scrutiny. (Fullerton Joint Union High School Dist. v. State Bd. of Educ., supra, 32 Cal.3d at p. 799.) (6) "[T]he strict standard of review has long been held to apply to voting legislation which excludes certain potential voters from participation. . . .'[a]lthough not every classification create. . .is subject to strict scrutiny, the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process.' [Citations.] For a

legislative classification relating to the elective process to avoid the strict scrutiny test of equal protection, it must have 'only minimal, if any, effect on the fundamental right to vote.' [Citation.]" (Hawn v. County of Ventura (1977) 73 Cal.App.3d 1009, 1019-1020 (141 Cal.Rptr. 111].)

(7) School district elections do not fall within the exception to the requirement for strict scrutiny for elections involving a special district of limited powers whose activities disproportionately affect members of a particular group. (Fullerton Joint Union High School Dist. v. State Bd. of Education, supra, 32 Cal.3d at p.805.) Though in some instances geographic restrictions on the franchise are not subject to strict scrutiny (see Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60 [58 L.Ed.2d 292, 99 S.Ct. 383]), our Supreme Court has interpreted that principle to apply only where geographical distinctions coincide with the boundaries of the governmental entity

concerned, and exclude no one residing within those boundaries. (Fullerton Joint Union High School Dist. v. State Bd. of Education, supra, 32 Cal.3d at p.803.)

Here, although the State Board proposed to split the Pasadena Unified School District, an existing entity with legal authority over public education within its boundaries, the right to vote this proposal was denied to all its residents except those living in the Greenwood Additions. We therefore conclude the decision of the State Board is subject to strict judicial scrutiny, and cannot be sustained unless justified by a compelling state interest.

(8) Respondents take the position that a compelling state interest is presented by the relative size of the voting groups. Tacitly acknowledging that the outcome of the election was foreordained when restricted only to those who proposed the issue, they nevertheless contend the substantial interests of the

Greenwood Addition voters in achieving their goal might be larger entity. They urge this greater electorate should not be granted a potential veto over matters which only tangentially affect them. We cannot agree. Although the state may be justified in excluding uninterested voters in order to protect the interests of persons vitally concerned (see Citizens Against Forced Annexation v. Local Agency Formation Com. (1982) 32 Cal.3d 816, 825 [187 Cal.Rptr. 423, 654 P.2d 193]), this is not such an instance.

With commendable candor, Pasadena Unified School District appropriately acknowledges that the instant secession, per se, would represent no significant financial impacts and it unlikely the loss of the small number of students directly involved would have a substantial effect upon either curriculum or facilities. Nevertheless, the racial impact upon the whole would be significant; immediately upon morale, and in the future when

this reorganization would serve as a model against the acute social problems of its predominantly minority district. Today segregation is more apt to occur in nibbles than gulps.

It is true that least some of the Greenwood Addition residents would be more sharply affected at the outset, since those with children would be able to enroll them in the public schools in San Marino Unified School District. However, the other residents of Pasadena Unified School District concerned with their public schools might feel the loss of that territory and the undermining of historic efforts to integrate the district more strongly than do the residents of the Greenwood Addition who have no school-aged children or whose children would continue to attend private schools.

We so not doubt that the interests of the residents of the Greenwood Addition and those of the Pasadena and San Marino Unified School

Districts coincide to the extent that they all desire the greatest possible educational opportunities for their children. That they may take opposing positions regarding the transfer does not mean that any group of voters is merely selfish or disinterested, but only that different interests are at stake. The fact Pasadena Unified School District's includes a desire to retain a declining White student base in not a reason to disenfranchise its citizenry. Consequently, we find the holding of the court in Fullerton Joint Union High School Dist. v. State Bd. of Education, supra, 32 Cal.3d at page 806, equally apposite here:

"In sum, we do not view the clas[s]ification at issue here as one which separates interested and uninterested voters, but one which divides two groups, each with a substantial although different interest in the election. In such a case the state has no compelling interest to grant the franchise to

one group and deny it to the other. We therefore conclude that the decision of the State Board, to the extent that it excluded [pasadena Unified School District] residents from voting at the election to approve the proposed secession of [the Greenwood Addition] form the [Pasadena Unified School District], denied such residents the equal protection of the laws."

The judgment of the superior court is reversed and the cause remanded with directions to modify the judgment in conformity with the views expressed herein. Since the modified judgment will afford Pasadena Unified School District substantially the relief it seeks, it shall recover its costs on appeal.

Nott, J., and Hart, J.,[5] concurred.

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[5]Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council

SUPREME COURT
FILED

DEC 17 1992

ROBERT WANDRUFF CLERK
DEPUTY

No. 2/2 B056556-S025687

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PASADENA UNIFIED SCHOOL DISTRICT, Appellant
v.
STATE BOARD OF EDUCATION, Respondent
JOHN MUSSER, Real Party in Interest

Pursuant to Rule 29.4(c), California Rules of Court, the above entitled review is DISMISSED and cause is remanded to the Court of Appeal, Second Appellate District, Division Two.

Lucas
Chief Justice

Mosk
Associate Justice

Panelli
Associate Justice

Kennard
Associate Justice

Baxter
Associate Justice

Arabian
Associate Justice

_____
Associate Justice

ARTICLE 1

Reorganization of School Districts by the Electorate

Section 35700. Petition

An action to reorganize one or more districts is initiated upon the filing, with the county superintendent of schools, of a petition to reorganize one or more school districts signed by any of the following:

(a) At least 25 percent of the registered voters residing in the territory proposed to be reorganized if the territory is inhabited. Where the petition is to reorganize territory in two or more school districts, the petition shall be signed by at least 25 percent of the registered voters in that territory in each of those districts.

(b) The owner of the property, provided that territory in uninhabited and the owner thereof has filed either a tentative subdivision map with the appropriate county or city agency or an application for any project, as defined in

Section 21065 of the Public Resources Code, with one or more local agencies.

(c) A majority of the members of the governing boards of each of the districts that would be affected by the proposed reorganization.

Section 35701. Designation of chief petitioners to receive notice

In any petition to reorganize school districts there shall be designated no more than three of the petitioners as chief petitioners for the purpose of receiving notice of any public hearings to be held on the petition.

Section 35702. Affidavit

The persons securing the signatures to a petition of electors to reorganize school districts shall attach thereto an affidavit that all persons who signed the petition did so in the presence of the affiant and each signature is a genuine signature of the person whose name it purports to be.

Section 35703. Contents of petition

Any petition filed under this article may

include any of the appropriate provisions specified in Article 3 (commencing with Section 35730).

Section 35704. Examination of petition

The county superintendent of schools, within 20 days after the petition for reorganization is filed, shall examine the petition and, if he or she finds it to be sufficient and signed as required by law, transmit the petition simultaneously to the county committee and to the State Board of Education.

Section 35705. Public hearings

Within 60 days after receipt of the petition, the county committee shall hold one or more public hearings thereon at a regular or special meeting in each of the districts affected by the petition. Notice of the public hearing shall be given at least 10 days in advance thereof to not more than three persons designated in the petition as the chief petitioners, to the governing board of all districts affected by the proposed

reorganization, and to all other persons requesting notice of the hearing.

Section 35705.5 Addition to and amendments of petition; Information to be available to public

(a) The county committee may add to the petition any of the appropriate provisions specified in Article 3 (commencing with Section 35730) which were not included in the petition as filed and may amend any such provision which was so included.

(b) At least 10 days before the public hearing, or hearings, on the petition, the county committee shall make available to the public and to the governing boards affected by the petition a description of the petition, including all of the following:

(1) The rights of the employees in the affected districts to continued employment.

(2) The revenue limit per unit of average daily attendance for each affected district and the effect of the petition, if approved, on such revenue limit.

(3) Whether the districts involved will be governed, in part, by provisions of a city charter and, if so, in what way.

(4) Whether the governing boards of any proposed new district will have five or seven members.

(5) A description of the territory or districts in which the election, if any, will be held.

(6) Where the proposal is to create two or more districts, whether the proposal will be voted on as a single proposition.

(7) Whether the governing board of any new district will have trustee areas and, if so, whether the trustees will be elected by only the voters of that trustee area or by the voters of the entire district.

(8) A description of how the property, obligations, and bonded indebtedness of existing districts will be divided.

(9) A description of when the first governing board of any new district will be elected and now the terms of office for each new trustee

will be determined.

Section 35706. Approval or disapproval by county committee

Within 90 days after affording the public an opportunity to comment on the petition, including any plans and recommendations included therein, the county committee shall recommend approval or disapproval of the petition as it may be augmented.

Section 35707. Transmission to State Board of Education

Except as provided in Section 35709 and 35710, the county committee shall forthwith transmit the petition to the State Board of Education together with its recommendations thereon. It shall also report whether any of the following, in the opinion of the committee, would be true regarding the proposed reorganization as described in the petition:

(1) It would adversely affect the school district organization of the county.

(2) It would be compatible with any master

plans submitted by the county committee and approved by the State Board of Education.

(3) It would comply with the provisions of Section 35753.

Section 35708. Hearing by State Board of Education

The petition transmitted pursuant to Section 35707, including the plans and recommendations included therein, if any, together with the recommended approval or disapproval and the plans and recommendations, if any, of the county committee shall be heard by the State Board of Education as provided in Article 4 (commencing with Section 35750).

Section 35709. Conditions under which petition may be granted without election

If the county committee approves the petition, it shall order that the petition be granted, and shall so notify the county board of supervisors if either of the following conditions are met:

(a) The petition is to transfer uninhabited

territory from one district to another and the owner of the territory, or a majority of the owners of the territory, and the governing board of all districts involved in the transfer consent to the transfer; or

(b) The petition is to transfer inhabited territory of less than 5 percent of the assessed valuation of the district from which the territory is being transferred, and both of the following conditions are satisfied:

(1) All of the governing boards have consented to the transfer.

(2) The county committee finds that the transfer will not affect the racial or ethnic integration of the districts affected.

Section 35710. Election to be called upon certain approved petitions

(a) If the county committee approves the petition, it shall so notify the county superintendent of schools who shall call an election in the manner described in Part 4 (commencing with Section 5000) to be conducted

at the next regular election in the territory to be transferred when the petition is to transfer inhabited territory of 5 percent or more of the assessed valuation of the district from which the territory is being transferred and both of the following conditions are met:

(1) All of the governing boards have consented to the transfer.

(2) The county committee finds that the transfer will not affect the racial or ethnic integration of the districts affected.

Section 35711. Appeal

Any person questioning the finding of the county committee pursuant to Section 35709 or 35710 that the proposed transfer of territory will not adversely affect the racial or ethnic integration of the schools of the districts affected, may appeal a decision made upon such a finding. The appeal shall be made to the State Board of Education within 30 days. The appeal shall be based upon factual and factual and statistical evidence.

If the State Board of Education denies the appeal, the decision of the county committee shall stand. If the State Board of Education approves the appeal, it shall review the findings of the county committee at a regular meeting of the board.

The State Board of Education shall notify the county committee on its decision on the appeal. If the State Board of Education approves the appeal, the county committee shall transmit a copy of the proceedings to the State Board of Education within 30 days after receipt of notice. The State Board of Education shall review the transcript, considering all factors involved. The State Board of Education may reverse, or may affirm, the decision of the transfer on integration of the schools of the districts affected, it shall direct the county committee to reconsider its decision and for this purpose to hold another hearing.

ARTICLE 2

County Committee on School District

Organization Plans and Recommendations for District Reorganization

Section 35720. Formulation

Each county committee on school district organization shall, under the direction of the State Board of Education, formulate plans and recommendations for the organization of the districts in the county or any portion thereof including, if appropriate, a portion of one or more adjacent counties.

Section 35720.5. Hearings on tentative recommendation; Notice

(a) The county committee shall adopt a tentative recommendation following which action it shall hold one or more public hearings in the area proposed for reorganization at least 30 days prior to submission of a final recommendation for unification or other reorganization to the State Board of Education.

(b) The public hearing required by this section shall be called when both of the following conditions are met:

(1) Notice is sent to the governing board of each school district involved at least 10 days prior to the hearing.

(2) Notice of the hearing is posted as provided in Section 5362 or notice of the hearing is published as provided in Section 5363.

(c) the notice shall contain information as to the time, place, and purpose of the hearing.

Section 35721. Petition by electors to reorganize; Hearing

(a) On receipt of a petition signed by at least 10 percent of the qualified electors residing in any district for a consideration of unification or other reorganization of any are, the county committee shall hold a public hearing thereon at a regular or special meeting.

(b) Following such hearing, the county committee shall grant or deny the petition. If the county committee grants the petition, it shall adopt a tentative recommendation following which action it shall hold one ore

more public hearings in the area proposed for reorganization. The provisions of Sections 35705 and 35705.5 shall apply to any such public hearing.

Section 35722. Adoption of final recommendation; Subsequent proceedings

Following the public hearing, or last public hearing, required by Section 35720 or subdivision (b) of Section 3572, the county committee may adopt a final recommendation for unification or other reorganization and shall transmit any such recommendation for unification or other reorganization and shall transmit any such recommendation together with the petition filed under subdivision (a) of Section 35721, if any, to the State Board of Education for hearing as provided in Article 4 (commencing with Section 35750); or shall order the reorganization granted if the requirements of Section 35709 are satisfied; or shall order that an election be held if the requirements of section 35710 are satisfied.

Section 35723. Notice to other county committee when study area includes territory under jurisdiction of another county

When a county committee selects an area for study for possible recommendation for reorganization which includes territory of one or more school districts under the jurisdiction of the county superintendent of schools of another county, the county committee shall so notify the members of the county committee of such other county. Thereafter, the members of the county committee of such other county shall be notified by mail of each public hearing or meeting of the county committee at which the proposed reorganization will be considered at least 10 days prior to the day of such hearing or meeting.

Section 35724. Action required of county committee of any adjacent county affected by recommendation

If plans and recommendations adopted by a county committee propose changes in the

boundaries or status of school districts under the jurisdiction of the superintendent of an adjacent county, the county committee of each such adjacent county shall be requested in writing to concur in the plans and recommendations.

If the county committee of any adjacent county concurs in the plans and recommendations, the concurrence shall accompany the recommendations transmitted to the State Board of Education.

If the county committee of any adjacent county fails to respond to the request for concurrence within 90 days of the date of the request, such failure shall be deemed to be a concurrence in the plans and recommendations.

If a county committee of an adjacent county does not concur in the plans and recommendations, it shall so notify the other county committee in writing and accompany the notification with plans and recommendations for the reorganization of school districts of its county including territory that would be

affected by the plans and recommendations of the other county committee. After 60 days from the notification of nonconcurrence, if the county committees are still unable to agree upon plans and recommendations for reorganization of the territory, the county committees, or any of them, may submit plans and recommendations to the State Board of Education, and the board may approve or reject the plans, or any of them, in the same manner as other plans and recommendations.

ARTICLE 3

Contents of Plans and Recommendations

Section 35730. Selection of governing law of new district which includes chartered city

The plans and recommendations, in connection with the proposed formation of a new unified school district to include within its boundaries a chartered city, may provide that the establishment and existence of the governing board of the district shall be governed by the charter of the city and not

exclusively by general law. Upon adoption of plans and recommendations containing such provision, the establishment and existence of the governing board of the district shall thenceforth be governed exclusively by the city charter and the board shall be a city board of education of a chartered city. In the absence of such a recommendation, the proposed new unified district shall be governed by general law.

Section 35731. Number of members on governing board

In any proposal for unification, plans and recommendations may include a provision for a governing board of seven members. In the absence of such a provision, any proposed new district shall have a governing board of five members.

Section 35732. Territory in which election to reorganize will be held

Plans and recommendation may include a provision specifying the territory in which the

election to reorganize the school districts will be held. In the absence of such a provision, the election shall be held only in the territory proposed for reorganization.

Section 35733. Plan to be voted on as single proposition when recommendation is to divide existing district

Whenever the recommendation is to divide the entire territory of an existing school district into two or more separate school districts, the recommendation may provide that the plans and recommendations be voted upon as a single proposition.

Section 35734. Provision for trustee areas

The plans and recommendation may include a provision for trustee areas that provide for representation in accordance with population and geographic factors of the entire area of the district. Any provision of that kind shall also specify the boundaries of the proposed trustee areas and shall specify whether members of the governing board shall be elected by the

registered voters of the entire school district or by only the registered voters of that particular trustee area. A proposal for trustee areas shall be considered as an inherent part of the proposal and not as a separate proposition.

In the absence of a provision for trustee areas, the proposed new district shall have a governing board elected by the registers voters of the entire district.

Section 35735. Computation of revenue limit

Any proposal for reorganization of school districts shall include a computation of the revenue limit per unit of average daily attendance for the proposed new district. Such provision shall be an inherent part of the proposal and shall not be construed as a separate proposition. If the reorganization is approved by the registered voters of the area, such revenue limit per unit of average daily attendance shall be the maximum revenue limit per unit of average daily attendance for the

type of new district formed until changed by Section 42238. Such revenue limit per unit of average daily attendance shall not be less than the revenue limit which would be produced if (1) for the year prior to the fiscal year in which the reorganization becomes effective for all purposes, the sum of the revenue limit of each of the districts proposed to be wholly included and the proportional share of the revenue limit of each district to be partially included in the proposed reorganized district is divided by the total number of units of average daily attendance that would have been in the proposed reorganized district had it been reorganized the year prior to the fiscal year in which the reorganization becomes effective for all programs plus, (2) the revenue limits per unit of average daily attendance required to equal the amount of the difference between the average certified and the average classified salary and fringe benefits of each of the component districts or

any portion of a district during the school year prior to that in which the district becomes effective for all purposes and the highest average certificated and highest average classified salary and fringe benefits of any component district included in the proposal multiplied by the number of employees in each category less the number of employees in each category of the district having the highest average salaries.

In computing the increase in the revenue limit in clause (2), any school district or, a portion of a district to be included in a proposal may be considered in determining the highest average salary or fringe benefits provided that such school district, or a portion of a district contains at least 10 percent of the total number of certificated and classified employees in the proposed reorganized district, plus (3), the estimated adjustment to the revenue limit per unit of average daily attendance pursuant to Section

42238 that the proposed reorganized district would be allowed had it been reorganized the year prior to the fiscal year in which the reorganization becomes effective for all purposes.

Section 35736. Proposal for division of personal property and obligations

Plans and recommendation may include a proposal for dividing the property, other than real property, and obligations of any school district proposed to be divided between two or more school districts, or proposed to be partially included in one or more school districts. As used in this section, "property" includes funds, cash on hand, and moneys due but uncollected on the date reorganization becomes effective for all purposes, and state apportionments based on average daily attendance earned in the year immediately preceding the date reorganization becomes effective for all purposes. In providing for this division, the plans and recommendation may

consider the assessed valuation of each portion of the district, the revenue limit per pupil in each district, the number of children of school age residing in each portion of the district, the value and location of the school property, and such other matters as may be deemed pertinent and equitable. Any such proposal shall be an integral part of the proposal and not a separate proposition.

Section 35737. Election on reorganization may include election for first governing board

Plans and recommendations may include a provision specifying that the election for the first governing board will be held at the same time as the election on the reorganization of the school districts. If such a provision is included, it shall specify the method whereby the length of the initial terms may be determined so that the governing board will ultimately have staggered terms which expire in years with regular election dates. In the absence of such a provision, the election of

the firs governing board will take place on the first regular election following the passage of the reorganization proposal.

Section 35738. Method of dividing bonded indebtedness

Plans and recommendations may include a method of dividing the bonded indebtedness other than the method specified in paragraphs (1) and (2) of subdivision (b) of Section 35576 for the purpose of providing greater equity in the division. Consideration may be given to assess valuation, number of pupils, property values, and other matters which the petitioners or county committee deems pertinent.

ARTICLE 4

Approval and Adoption of Plans and Recommendations

Section 35750. Standards to be applied

The State Board of Education shall establish minimum standards which it shall apply to approving or disapproving petitions and proposal for the formation or reorganization of

school districts.

Section 35751. Statistical information

When it is necessary for the State Board of Education to consider petitions submitted under this chapter and prepare a proposal relating to such a petition, each county superintendent of schools and every other county officer in the counties affected, and the district superintendent of the school districts affected shall provide the statistical information required by the Department of Education to complete the study.

Section 35752. Hearing; Notice

When a petition for reorganization of a district is received in the office of the secretary of the State Board of Education, the secretary shall set the petition for hearing at a regular or special meeting of the board. At least 30 days prior to the date of the hearing, he or she shall send by registered mail a notice containing a general statement of the purpose of the petition and the time and place

of the hearing to each of the following persons or agencies:

(a) The governing board and district superintendent of each school district whose boundaries would be affected.

(b) The county superintendent and count county committee of each county which has jurisdiction over any of the districts whose boundaries would be affected.

(c) The persons designated in the petition as "chief petitioners."

Section 35753. Conditions for approval

(a) The State Board of Education may approve proposals for the reorganization of districts, if the board has determined, with respect to the proposal and the resulting districts, that all of the following conditions are substantially met:

(1) That the new districts will be adequate in terms of number of pupils enrolled.

(2) That the districts are each organized on the basis of a substantial community identity.

(3) That the proposal will result in an equitable division of property and facilities of the original district or districts.

(4) That the reorganization of the districts will not promote racial or ethnic discrimination or segregation.

(5) The proposed reorganization will not result in any substantial increase in costs to the state.

(6) The proposed reorganization will not significantly disrupt the education program of districts not included in the proposal.

(7) Such other criteria as the board may, by regulation, prescribe.

(b) The State Board of Education may approve a proposal for the reorganization of school districts if the board determines that it is not practical or possible to apply the criteria of this section literally, and that the circumstances with respect to the proposals provide an exceptional situation sufficient to justify approval of the proposals.

Section 35754. Approval or disapproval; Amendment of proposal

After affording interested persons an opportunity to present their views on the petition and after the hearing any finding and recommendation of the State Superintendent of Public Instruction, the State Board of Education shall approve or disapprove the formation of the proposed new district. If the board approves the formation, it may amend or include in the proposal any of the appropriate provisions of Article 3 (commencing with Section 35730).

Section 35755. Notice of approval

After the State Board of Education has approved the plans and recommendations for the unification or other reorganization of the school districts in any area, the secretary of the State Board of Education shall give notice of the approval to the county superintendent of schools having jurisdiction over any of the districts whose boundaries or status would be

affected by the reorganization as proposed.

Section 35756. Calling of Election

The county superintendent of schools, within 20 days after receiving the notification provided by Section 35755, shall call an election, in the manner prescribed in Part 4 (commencing with Section 5000), to be conducted at the next available regular election, in the territory of districts as determined by the State Board of Education.

Section 35756.5. Transfers of territory from one district to another; Elections

In the case of the transfer of territory from one district to another, if the transfer is opposed by the governing boards of one or more of the districts affected with an average daily attendance of 900 or less, the territory in which the election is held shall include the entire territory of the districts opposing the transfer. Each district affected with an average daily attendance of 900 or less, the territory in which the election is held shall

include the entire territory of the districts opposing the transfer. Each district with an average daily attendance or 900 or less which is included in an election because of the objection of its governing board to the transfer shall bear the additional cost of holding the election in that portion of its territory not otherwise included in the election. When a majority of the votes cast in the school district opposing the transfer and a majority of the votes cast in the entire territory in which the election is held are in favor of the reorganization, the proposal carries.

Section 35757. Statement of official information and statistics

The county superintendent of schools shall prepare a statement of official information and statistics relating to the proposed reorganization which shall include, but is not limited to, the plans and recommendations, the revenue limit per pupil, the rate of growth,

the expected enrollment, and the support form the state which can be expected if such area maintains an adequate school program. Such statistics shall be based upon the school year last completed before the date of the election.

Section 35758. Distribution of argument for and against recommendations

The county superintendent of schools calling the election shall cause to be prepared and distributed a statement setting forth arguments for and against the recommendations. The argument shall not exceed 500 words. The argument in favor of the recommendation shall be prepared by the president of the county board or by a proponent of the recommendation designated by the president. The arguments against the recommendations shall be prepared by a member of the county board who voted against the recommendations, or, if there be none, by an elector designated by the county superintendent of schools who has appeared before the board or at a public hearing in

opposition to the recommendation.

Section 35760. Campaign literature

(a) Any circular, pamphlet, letter, poster, or other campaign literature which is designed to promote either the passage or defeat of a ballot measure proposing the reorganization of school districts shall bear on its face, in a conspicuous place, either of the following:

(1) The names and residence addresses of the chairmen and secretary, or the names and residence addresses of at least two officers of the organization issuing it, if issued by an organization.

(2) The name and residence address, with the street and number, if any, of any individual responsible for it, if issued by an individual or individuals.

(b) If any person eligible to vote upon such ballot measure has reason to believe that such campaign literature contains false and misleading statements, he or she may bring an action in the superior court for injunctive

relief against further circulation of the literature, and if the court finds that the literature does, in fact, contain false and misleading statements, it may enjoin any further circulation of the literature.

Section 35761. Eligibility to vote

Every qualified elector residing within the territory in which the election is called shall be eligible to vote at such election.

Section 35762. Ballot

The words to appear upon the ballots used for voting upon the adoption or rejection of the proposals for the reorganization of school districts shall be "Reorganization of school districts - Yes," and "Reorganization of school districts - No," or words of similar import. If the plans and recommendations include a proposal for trustee areas in accordance with Section 35734, such proposal shall be considered a part of the reorganization proposition to be voted upon, and the ballot shall include wording to that effect.

Section 35763. Tabulation of votes

Upon the completion of the canvass of the election returns and the absentee ballots, the county superintendent of schools shall tabulate such returns and the absentee ballots, and notify the Superintendent of Public Instruction, the board of supervisors and the governing board of each affected school district of the number of votes cast for, and the number of votes cast against, the reorganization of school districts in each school district and also the total number of votes cast for, and the total number of votes cast against, the reorganization of school districts.

Section 35764. Majority vote

When a majority of all the votes are cast in favor of the reorganization or other proposal, the proposal carries.

Section 35765. Order following approval

After the board of supervisors receives a proper certificate of election of other proper

evidence that an action to organize or reorganize school districts has been approved as provided by law, the board of supervisors shall make an order to create, change, or terminate school districts as may be required by the action and establish or reestablish the boundaries of the districts affected by the action. The order shall be entered in the county's record of school districts.

If the action results in the creation of a district or a change of district boundaries of the type described in Section 54900 of the Government Code, the order of the board of supervisors shall include the legal description of each district created or changed in the action and, immediately after making the order, the board of supervisors shall cause a copy of the order and a map or plat indicating the boundaries established or reestablished for each district affected by the order to be filed as required by Chapter 8 (commencing with Section 54900) of Part 1 of Division 2, Title

5 of the Government Code.

Section 35766. Limitation period to challenge reorganization

After the expiration of one year from the date of the order, the order shall be conclusive evidence that the school district has been legally organized, or the boundaries legally changed, as the case may be, and no suit shall be maintained which questions the validity of the organization or change of boundaries.

Section 35767. Consideration of election to form new district and choose governing board members

Except as otherwise provided in Article 1 (commencing with Section 35100) of Chapter 2 of Part 21, and notwithstanding the provisions of Section 35101, the county superintendent of schools having jurisdiction may consolidate the election for the purpose of electing the schools having jurisdiction may consolidate the election for the purpose of electing the governing board of a unified school district

proposed to be formed under Chapter 2 (commencing with Section 4200) of Part 3 with the election held for adopting or rejecting the plans and recommendations for the formation of a new district. The election shall be called, held, and conducted pursuant to Article 1 (commencing with Section 5000) of Chapter 1 of Part 4, Chapter 3 (commencing with Section 5300) of part 4, and Article 1 (commencing with Section 35100) of Chapter 2 of Part 21, except that the question of formation of a unified school district and any other proposition to be voted upon shall appear on the ballot before the list of candidates for election to the governing board of the proposed unified district.

APPENDIX D

[No. S023805. Nov., 1992.]

BOARD OF SUPERVISORS OF SACRAMENTO COUNTY et al.,
Plaintiffs and Appellants, v.
LOCAL AGENCY FORMATION COMMISSION OF SACRAMENTO COUNTY, Defendant and Appellant;
CITRUS HEIGHTS INCORPORATION PROJECT, Real Party in Interest and Appellant.

OPINION

MOSK, J.--Residents of an unincorporated area of Sacramento County seek to incorporate into a city. Government Code section 57103 provides that only the voters residing in the territory to be incorporated may vote to confirm the incorporation. The Court of Appeal found this law unconstitutional as applied, holding that it violates the guaranty of equal protection of the laws. We conclude that the law is constitutional, both on its face and as applied to the incorporation at issue.

The case before us illustrates the tension between California's financially beleaguered counties and the desire of residents of unincorporated areas to form cities and draw

local government closer to home.[1] With the fall in tax rates following the adoption of Proposition 13 (Cal. Const., art. XIII A) in 1978, and a concomitant population-driven rise in demand for services, this tension has grown in recent years: at least one California county has considered bankruptcy and, like the state itself, all counties have had to make painful spending decisions. The counties fear that if tax-rich districts form cities, the counties will be deprived of revenue and their financial position further weakened. (See Arrival of New Cities Puts Counties on a Starvation Diet, L.A. Times (Orange Co. ed., Feb 17, 1991) Metro

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[1]California's 58 counties contained 456 incorporated cities on November 30, 1991. (Hornor, Cal. Cities, Towns & Counties (1992 ed.)p. vii, hereafter Hornor.) "Between the passage of Proposition 13 in 1978 and July 1, 1988, 32 cities were incorporated in California, nearly twice the number incorporated in the previous decade." (Assem. Off. of Research, California 2000: Getting Ahead of the Growth Curve (Dec. 1989) p.12.)

sec., pt. B, p. 8, col. 1.) On the other hand, community residents and landowners often prefer to govern their local affairs insofar as possible, and cityhood provides them with greater opportunities for self-determination than does residence or ownership in a more amorphous unincorporated area. The evolution of cities is a natural process when population grows and communities begin to form their own identities.

Acknowledging the tension between fiscal concerns and the desire for self-government, the Legislature enacted the Cortese-Knox Local Government Reorganization Act of 1985[2]. The Cortese-Knox Act consolidated three major laws governing local government boundary changes. As explained in Fallbrook Sanitary Dist. v. San Diego Local Agency Formation Com. (1989) 208

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[2]Government Code section 56000 et seq., hereafter the Cortese-Knox Act or the act. Unlabeled section references are to the Government Code.

Cal.App.3d 753, 758 [256 Cal.Rptr. 590], "In 1985, the Legislature repealed the Knox-Nisbet Act (former § 54773 et seq.), the District Reorganization Act of 1965 (former § 56000 et seq.) and the Municipal Organization Act of 1977 (former § 35000 et seq.), and replaced these laws with the Cortese-Knox Act. . . ." The new scheme's provisions became operative January 1, 1986. (Ibid.)

In 1986 persons in the unincorporated Sacramento County community of Citrus Heights, containing a population of approximately 69,000, collected enough valid signatures to qualify an incorporation petition to the Sacramento County Local Agency Formation Commission (commission), which by law supervised municipal incorporations in the county. Following an environmental review and other proceedings, the commission declared that the law did not require an environmental impact report and approved a resolution setting forth the incorporation proposal. The resolution

contained a provision designed to mitigate the financial impact on the county: the proposed city limits were relocated to exclude a sales tax-rich shopping center. Requests for reconsideration of that resolution followed, in part on the ground that the boundaries still unfairly impacted the county's tax base. the commission adopted a new resolution that moved another shopping center outside the proposed city limits, and then, to further mitigate the county's financial loss, amended that resolution to require that the new city's receipt of property taxes be phased in more slowly. In accordance with section 57103, the commission ordered a confirming election to be held only within the territory of the proposed city.[3]

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[3]As relevant here, section 57103 provides:

"In any resolution ordering a change of organization or reorganization subject to the confirmation of the voters, the conducting authority shall call an election:

"(a) Within the territory of

The lawsuit followed. Plaintiffs include the Sacramento County Board of Supervisors, the Sacramento County Deputy Sheriffs' Association and Sacramentans to Save our Services. The latter party alleged that it is an unincorporated umbrella organization of some 40 social and community service, labor, law enforcement, and business organizations, many of which receive county funds. Displeased, among other things, with the law's limitation of the confirming election to the voters in the territory to be incorporated, plaintiffs challenged the limitation's constitutionality on the ground that section 57103 denies them equal protection of the laws. (U.S. Const., Amend. XIV, § 1; Cal. Const., art. I, § 7.)

At a hearing on plaintiffs' petition for writ of mandate and complaint for injunctive and declaratory relief, the court entered

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each city or district ordered to be incorporated, formed, disincorporated, dissolved, or consolidated."

judgment in plaintiffs' favor on certain environmental impact issues but refused to find the voting limitation in the act unconstitutional.

The Court of Appeal affirmed the judgment on the environmental impact issues, but reversed on the constitutional question. Relying on language in the companion cases of Fullerton Joint Union High School Dist. v. State Bd. of Education (1982) 32 Cal.3d 779, 805 [187 Cal.Rptr. 398, 654 P.2d 168]) (Fullerton), and Citizens Against Forced Annexation v. Local Agency Formation Com. (1982) 32 Cal.3d 816, 826 [187 Cal.Rptr. 423, 654 P.2d 193] (Citizens), the Court of Appeal adopted a standard it conceded to be "a somewhat rubbery ruler": i.e., that "it is a potential voter's substantial interest in the change which determines whether the residency line has been drawn in such a way as to result in impermissible disenfranchisement and the consequent strict scrutiny of that line." The

court decided that the county's electorate had a substantial interest in the incorporation because, given the high level of local government services the county provides in its heavily populated unincorporated area, the incorporation of Citrus Heights would generate significant effects. The court quoted another source that described the unincorporated area as "'a pseudo-city of 550,000'" that contains almost two-thirds of all county residents and offers "'municipal services . . . of a very high standard . . . comparable to the level of service received by cities of the same size. . . . The Sheriff's and Public Works Departments may be the largest in the state and offer very sophistica[t]ed services.'" For that reason, the court implied, the incorporation of Citrus Heights would be tantamount to a secession from Sacramento County. The court concluded that section 57103 is unconstitutional as applied to the proposed incorporation because it deprives other voters in the county's unincorporated

areas of the right to vote on the question and thereby violates the equal protection clause.

The Court of Appeal fairly interpreted Fullerton and Citizens. As we shall explain, however, those cases do not mandate a conclusion that section 57103 is unconstitutional.

I.

The Cortese-Knox Act requires that every unconsolidated county have a local agency formation commission (see § 56325), appointed by local law-making bodies (ibid.), to "review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization. . ." (§ 56375, subd. (a).). A change of organization includes the incorporation of a city with at least 500 registered voters from unincorporated county land. (§§ 56021, subd. (a), 56043.) Territory to be incorporated as a city must be located in one county (§ 56110.)

A local agency formation commission ordinarily is a five-member body that includes two county representatives from the board of supervisors (board), two city representatives "each of whom shall be a city officer" (defined in § 56025 as a mayor or city council member), and one member of the general public chosen by the other four. (§ 56235.) The panel must be enlarged to include two representatives of special districts if the commission of any county (1) orders special districts to be represented thereon and (2) adopts regulations affecting the "functions and services" of such districts. (§ 56332, subd. (a).)

The act, however, prescribes special treatment for almost one-third of California's 58 counties. The Legislature has created exceptions for four larger counties (§§ 56326-56328): Los Angeles, Santa Clara, San Diego, and, of significance in this case, Sacramento. "In Sacramento County, the commission shall consist of seven members, selected as follows":

two board members representing the county; a representative for the city of Sacramento "who is a member of the city council, appointed by the mayor and confirmed by the city council"; a representative for the cities in the county "who is a city officer appointed by the city selection committee"; "[t]wo representing special districts selected by an independent special district selection committee"; and a member of the general public appointed by the other six. (§ 56326.5.)

For reasons we will discuss below, we find it noteworthy that although the four counties that sections 56326 to 56328 except form the general rules are populous, other heavily populated counties, such as Alameda (1990 population 1,279,182) and Orange (1990 population 2,410,556), receive no special treatment.

There are still other exceptions. In

counties containing no incorporated city,[4] the commission must have five members, including three from the board and two from the general public appointed by the first three. (§ 56329.) In those counties containing but one city,[5] the commission is also a five-member body: two form the board, one a city officer from the lone city, and two members of the general public appointed by the first three. (§ 56330.)

Either a public petition or an affected local agency's legislative resolution is required to request a change of organization. (§§ 56650, 56800.) As a practical matter, an incorporation request will ordinarily be by petition, because it is difficult to imagine a local government entity seeking the creation of

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[4]Currently Alpine, Mariposa, and Trinity. (Hornor, supra, at pp. 460-462.)

[5]Currently Calaveras (Angels Camp), Del Norte (Crescent City), Inyo (Bishop), Lassen (Susanville), Modoc (Alturas), Mono (Mammoth Lakes), Plumas (Portola), Sierra (Loyalton), and Tuolomene (Sonora). (Hornor, supra, at pp. 460-462.)

a rival for tax revenues.

The commission cannot act on an incorporation petition unless signed by not less than 25 percent of the registers voters residing in the territory of the proposed city or by not less than 25 percent of the landowners, which latter group must also own not less than 25 percent of the assessed land value. (§ 56750.) To be valid an incorporation petition in Sacramento County must satisfy nine different descriptive criteria (§ 56700), and all signatures must be gathered in six months (§ 56705, subd. (a)).

Only after these hurdles have been surmounted does the commission have the power to approve or disapprove an incorporation in whole or in part. But the Cortese-Knox Act does not give the commission carte blanche to approve incorporations. Its discretion is limited by requirements, among others, that the incorporation be consistent with the act's intent; that the commission have reviewed the

comprehensive fiscal analysis prepared under section 56833.1,[6] the Controller's report prepared under section 56833.3, the report of the commission executive officer (an individual defined in § 56038), and the testimony presented at a public hearing; and that the proposed city likely will be fiscally sound for three years following its incorporation (§ 56375.1).

The commission cannot ratify an incorporation petition without a public hearing. (§§ 56836, subd. (B), 56069, 56021, subd. (a).) The county is given notice of the

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[6]The comprehensive fiscal analysis must describe at a minimum (§ 56833.1, subd. (d)) the proposed city's revenues and expenses during the three fiscal years following incorporation (id., subd. (a), (b)), and the fiscal effects on "any affected local agency," including the county (see §§ 56014, 56054), during that time (§ 56833.1, subd. (c)). At the request of an "interested party" (not defined in the act, but apparently any "person," see § 56833.3, subd. (d)) the Controller must review the analysis (id., subd. (a)).

hearing (§ 56835, subd. (e)), and its presence is assured in any event because of the law's requirement that board members serve on the commission. In reviewing an incorporation proposal, the commission is required to consider a multitude of factors.[7] An

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[7]These include but are not limited to:

"(a) Population, population density; land area and land use; per capita assessed valuation; topography [and] natural boundaries ...; proximity to other populated areas; the likelihood of significant growth in the area, and in adjacent incorporated and unincorporated areas, during the next 10 years.

"(b) ...[T]he present cost and adequacy of governmental services ...; probably future needs for those services ...

"....

"(c) The effect of the proposed action ...on adjacent areas, on mutual social and economic interests, and on the local governmental structure of the county.

"....

"(g) Consistency with city or county general and specific plans.

"....

"(i) The comments of any affected local agency [including a city or county: see §§ 56014, 56054]." (§ 56841.)

incorporation proposal also triggers an elaborate inquiry into the reapportionment of property tax revenues. (§ 56842.)

The commission may make its approval conditional on a virtually limitless array of factors (see § 56844, subd. (v)), which are set forth in detail in sections 56843 and 56844.[8] Finally, if the commission abuses its discretion by making a determination not supported by substantial evidence in light of the whole record, the courts may invalidate its decision. (§§ 56107.)

After the commission has completed

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[8]These include reimbursement for the acquisition or use of public property (§ 56844, subd., (a)), apportionment of bond obligations between the country and the proposed city (id., subd. (c)), the incurring of new debt (id., subd. (f)), property transfers (id., subd. (h)), employee discharges and modification or termination of employment contracts (id., subd. (i)), and the transfer of authority and responsibility among any affected cities and counties for the administration of special tax and special assessment districts (id., subd. (u)).

its inquiry and issued a resolution approving or disapproving the proposal (see §§ 56851-56852), a county, or others affected by the decision, may request reconsideration (§ 56857, subd.(a)). Several such requests were made in this case, and, as noted above, the commission acted on them (see § 56858), modifying its resolutions to mitigate the impact of the incorporation of Citrus Heights on the county's finances.

Once the commission has issued its final resolution, the matter is in the hands of the "conducting authority," which in this case is the Sacramento County Board of Supervisors (§ 560929, subd. (e)(1)). The board must conduct a public hearing on the proposal. (§§ 57025, subd. (a) 57050.) If more than 50 percent of the voters in the territory to be incorporated protest the incorporation, the board must end the proceedings. (§§ 57077, subd. (a)(1), 57078, subd. (b); see § 56043.) Otherwise it must order the incorporation, subject to the

voters' "confirmation." (§ 57077, subd. (a)(2); see also §§ 57133, subd. (a) 57137 [form of question].)

As the foregoing recitation reveals, the voters' role under the Cortese-Knox Act in confirming an incorporation is rather like that of the masons who place a keystone at the apex of a high and intricate arch. The voters' approval is an essential piece, but as we have shown, but he time the question reaches the electorate the incorporation proposal will already have undergone a labyrinthine process containing elaborate safeguards designed to protect the political and economic interests of affected local governments, residents, and landowners.

II.

(1a) As noted above, the Court of Appeal held section 57103 unconstitutional as applied to the proposed incorporation of Citrus Heights because it deprives other voters in Sacramento County's unincorporated areas of a vote on the

questions and thereby violates the equal protection clause. (2) We begin our discussion of the statute's constitutionality by examining first its facial validity under federal and California precedent, and then its validity, under the principles distilled from that precedent, as applied to the electorate of Sacramento County. We undertake the facial review first because if the law is unconstitutional as violating the equal protection clause on its face, and hence incapable of any valid application, there is no need to consider its application to the incorporation in question. (See generally Quinn v. Millsap (1989) 491 U.S. 95 [105 L.Ed.2d 74, 109 S.Ct. 2324].) On the other hand, if the law on its face survives an equal protection challenge, our inquiry does not end until we decide whether the law must still be condemned as applied. (See Milwaukee County Pavers Ass'n v. Fiedler (7th Circ. 1991) 922 F.2d 419, 423.)

(3) Not all statues classify, but many do, and whenever the classification is challenged under the equal protection clause, we must decide its validity under one of the standards of deference required of us. (See Nordlinger v. Hahn (1992) 505 U.S. __ [120 L.Ed.2d 1, 12, 112 S.Ct. 2326].)

When a law impinges on certain fundamental right -- and the right to vote may be the most fundamental of al (Westberry v. Sanders (1964) 376 U.S. 1, 17 [11 L.Ed2d 481, 491-492, 84 S.Ct. 526]; see also Cal. Const., art. II § 2) -- it will ordinarily be subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification in necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible. (Plyler v. Doe (1982) 457 U.S. 202, 217 [72

L.Ed.2d 786, 799, 102 S.Ct. 2382]; In re Griffiths (1973) 413 U.S. 717, 721-722 [37 L.Ed.2d 910, 915-916, 93 S.Ct. 2851]; Bernal v. Fainter (1984) 467 U.S. 216, 219, 227 (81 L.Ed.2d 175, 179, 184-185, 104 S.Ct. 2312]; see also International Paper v. Inhabitants of Town of Jay (D.Me. 1990) 736 F.Supp. 359, 363, affd. (1st Circ. 1991) 928 F.2d 480; Hunh v. Carlucci (D.D.C. 1988) 679 F.Supp. 61, 66.)

For most legislation, however, a court will apply the rational basis test. The "standard formulation of the test for minimum rationality" (Tribe, American Constitutional Law (2d ed. 1988) § 16-3, p. 1444, fn. 10) is whether the classification is "rationally related to a legitimate governmental purpose." (Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 446 [87 L.Ed.2d 313, 324, 105 S.Ct. 3249].) Put another way, the classification must bear some fair relationship to a legitimate public purpose. (Plyler v. Doe, supra, 457 U.S. at p. 216 [72 L.Ed.2d at

pp. 798-799].)

(1b) The question we confront, therefore, is whether section 57103 impinges on the right to vote in a manner that requires the application of strict scrutiny. As will appear, the statute does not compel that standard of review.

We agree that section 57103 touches on the right to vote. **(4a)** As it happens, the right to vote does not include a right to compel the state to provide any electoral mechanism whatever for changes of municipal organization. Such line-drawing is a function that the Legislature may reserve to itself. (See People ex rel. Younger v. County of El Dorado (1971) 5 Cal.3d 480, 502-503, 505 [96 Cal.Rptr. 553, 487 P.2d 1193].) But when the state has provided for the voters' direct input, the equal protection clause requires that those similarly situated not be treated differently unless the disparity is justified. (See Harper v. Virginia Bd. of Election (1966) 383 U.S.

663, 665 page 916, [16 L.Ed.2d 169, 171-172, 86 S.Ct. 1079].) **(1c)** As we explain post, page 916, federal precedent requires that we view all Sacramento County residents as similarly situated, for all are affected to some degree by the proposed incorporation.

(4b) The mere fact, however, that a state law touches on the right to vote does not necessarily require the application of strict scrutiny. (Burdick v. Takushi (1992) 504 U.S. __[119 L.Ed.2d 245, 252, 112 S.Ct. 2059].) Rather, "the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process." (Choudhry v. Free (1976) 17 Cal.3d 660, 664 [131 Cal.Rptr. 654, 552 P.2d 92, 100, 92 S.Ct. 849].) **(1d)** As we no undertake to explain by reviewing federal precedent, section 57103's impact in the case before us falls well short of the "real and appreciable," for individual interests in voting are much attenuated by the

state's plenary power to oversee and regulate the formation of its political subdivisions, and the same power entitles the state to identify as differing in degree the interests of those who may vote under section 57103 and those who may not.

(5) In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance. (United Building & Constr. Trades v. Mayor (1984) 465 U.S. 208, 215 [79 L.Ed.2d 249, 256-257, 104 S.Ct. 1020]; Trenton v. New Jersey 91923) 262 U.S. 182, 189-190 [67 L.Ed.2d 937, 942, 43 S.Ct. 534]; Cal. Const., art XI, §§ 1, subd. (a), 2, subd. (a); § 23002.) Accordingly, the United States Supreme Court has long recognized the states' plenary power to create and dissolve their political subdivisions. In Hunter v. Pittsburg 91907) 207 U.S. 161 [52 L.Ed.2d 151, 28 S.Ct. 40], "the seminal constitutional decision addressing

a challenge to a state procedure regulating the formation and organization of local governmental entities" (Fullerton, supra, 32 Cal.3d at p. 809 [conc. & dis. opn. of Kaus, J.]), residents of Allegheny, threatened with absorption by much larger Pittsburgh, challenges a Pennsylvania law authorizing the two cities' consolidation if a majority of the total votes cast in a referendum approved consolidation. One ground for the challenge was that the law was "in violation of the law of the land, it being ...unequal... in that it permits the qualified electors of the larger city to overpower and outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified electors of the lesser city." (207 U.S. at p. 168 [52 L.Ed.2d at p. 155], internal quotation marks omitted.) We read this assignment of error as raising an equal protection challenge on voting-rights grounds.

The federal high court, noting that

"[m]unicipal corporations are political subdivisions of the State," concluded, "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State ...The State, therefore, at its pleasure may modify or withdraw all such powers with another municipality [or] repeal the charter and destroy the corporation ...with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants ...may by such changes suffer inconvenience [or] ...the burden of increased taxation, ...there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are

alone responsible for any unjust or oppressive exercise of it." (Hunter v. Pittsburgh, supra, 207 U.S. at pp. 178-179 [52 L.Ed.2d at pp. 159-160].)

The foregoing language is, of course, immediately noteworthy for the breadth of its scope, and to a certain extent it bespeaks the judicial confidence of a simpler era. But Hunter's fundamental holding survives. "Although subsequent cases have properly recognized that Hunter's broad language must necessarily be qualified by a state's fundamental constitutional obligation to avoid racial or other invidious discrimination (see, e.g., Gomillion v. Lightfoot (1960) 364 U.S. 339 [5 L.Ed.2d 110, 81 S.Ct. 125]), recent Supreme Court decisions have not wavered from the basic proposition that states have 'extraordinarily wide latitude ...in creating various types of political subdivision and conferring authority upon them.' [Citation.]" (Fullerton, supra, 32 Cal.3d at p. 810 [conc.

& dis. opn. of Kaus, J.].)

In Lockport v. Citizens for Community Action (1977) 430 U.S. 259 [5] L.Ed.2d 313, 97 S.Ct. 1047] (Lockport), the court faced a constitutional challenge to a New York law that forbade the implementation of a new Niagara County charter unless approved by concurrent majorities of both the city and noncity residents of the county. The unincorporated-area residents, though fewer in number, voted against the new charter; thus it was defeated even though a majority of the total votes cast favored it.

The concurrent-majority requirement was challenged on equal protection grounds. In deciding the question, the United States Supreme Court, though implicitly deciding the different classes of county resident were similarly situated because living in the county and affected by any charter change (see Lockport, supra, 430 U.S. at p. 268 [51 L.Ed.2d at pp. 322-323])., applied the rational basis

test. The court stated that if there "is a genuine difference in the relevant interests of the groups that the state electoral classification has created" then an "enhancement of minority voting strength" is permissible unless it "nonetheless amounts to invidious discrimination in violation of the Equal Protection Clause." (Ibid.) In other words, if the state's citizens have different interests, then an electoral classification for a referendum that organizes local government will survive an equal protection challenge unless it works a purely arbitrary result.

Applying that test, the high court held that "the State's identification of the distinctive interests of the residents of the cities and towns within a county rather than their interests as residents of the county as a homogeneous unit" arose from "the realities of the distribution of governmental powers in New York, and is consistent with our cases that recognize ...the wide discretion the States

have in forming and allocating governmental tasks to local subdivisions [see Hunter v. Pittsburgh, supra, 207 U.S. 161] ..." Thus the state could decide that city and noncity residents possessed genuinely different relevant interests. And the court held that the classification was not arbitrary and hence did not violate equal protection principles. (Id. at pp. 272-273 [51 L.Ed.2d at pp. 324-325].)

Lockport recognizes the high degree of deference due to a voting-based classification when a state undertakes the essentially political task of apportioning power among its local governmental subdivisions --"constituent units that in a sense compete to provide similar governmental services" (430 U.S. at p. 272 [51 L.Ed.2d at pp. 324-326]).

To be sure, Lockport did not decide what standard of deference applies when voters with a more diffuse interest in an incorporation are excluded from voting to confirm the result of

a legislative scheme that tries to balance competing interest in the politically freighted incorporation process. To our knowledge, the United States Supreme Court has never addressed this question. (1e) But we conclude that we should not apply strict scrutiny. under Lockport, supra, 430 U.S. 259, the residents in the area to be incorporated and the remaining residents of Sacramento County possess, on the face of the law, genuinely different relevant interests. Thus, though the right to vote is perforce implicated whenever the state specifies that certain people may vote and others may not, we conclude that the essence of this case is not the fundamental right to vote, but the state's plenary power to set the conditions under which its political subdivisions are created. For that reason, the impairment of the right to vote is insufficiently implicated to demand the

application of strict scrutiny.[9]

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[9]In analogous decisions the court has applied a deferential standard to far more direct impairments of individual civil liberties when the government exercises plenary regulatory power in areas substantially related to incidents of sovereignty.

In Cabell v. Chavez-Salido (1982) 454 U.S. 432 [70 L.Ed.2d 677, 102 S.Ct. 735], the court decided that although state classifications causing economic discrimination against lawfully resident aliens may be subject to heightened scrutiny (see also Bernal v. Fainter, supra, 467 resident aliens may be subject to heightened scrutiny (see also Bernal v. Fainter, supra, 467 U.S. 216, 219 & fn. 5 [81 L.Ed.2d 175, 179-180] [stating general rule])it would not apply the more exacting standard to California law that requires probation officers to be United States citizens. (§ 1031, subd. (a); Pen. Code, § 830.5, subd. (a).) The court reasoned that the requirement warranted judicial deference because it related to "sovereign functions of government: (454 U.S. at p. 438 [70 L.Ed.2d at pp. 683-684]). "[S]trict scrutiny is out of place when the restriction primarily serves a political function: "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government ...'" (Id. at

We reach the foregoing conclusion notwithstanding our prior decisions in this area.

Fullerton, supra, 32 Cal.3d 779, considered the constitutionality of a State

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p. 439 [70 L.Ed.2d at p. 684]; see also Goldman v. Weinberger (1986) 475 U.S. 503, 510 [89 L.Ed.2d 478, 485-486, 106 S.Ct. 1310] [turning back First Amendment challenge to military regulations forbidding the wearing of a yarmulke "even though [the] effect is to restrict the wearing of the headgear required by ...religious beliefs."]; Fiallo v. Bell (1977) 430 U.S. 787 [52 L.Ed.2d 50, 97 S.Ct. 1473] [upholding immigration law's classification on the basis of the parent's sex or marital status].)

The military and immigration decisions are only analogues, but we find them useful because in a similar vein the high court has emphasized for decades the states' plenary power to control the formation of local government entities. (Hunter v. Pittsburgh, supra, 207 U.S. 161 [52 L.Ed.2d 151]; Lockport, supra, 430 U.S. 259 [51 L.Ed.2d 313].) Such control falls within the ambit of California's "'constitutional responsibility for the establishment and operation of its own government ...'" (Cabell v. Chavez-Salido, supra, 454 U.S. at p. 439 [70 L.Ed.2d at p. 684].)

Board of Education (hereafter education board) decision to calve a new school district in Yorba Linda from its Fullerton parent. The education board ordered an election to be held on the secession, and ordered the question submitted to the Yorba Linda electorate only. Fullerton overturned the education board's decisions.

Fullerton's reasoning is embodies in a plurality opinion signed by three justices. The plurality concluded that the equal protection clause required strict scrutiny to be applied to the eduction board's decision to limit the vote to Yorba Linda residents. The plurality reasoned that because the decision impinged more than marginally or incidentally on the right to vote, it could be given effect only if the education board could show that it had a compelling interest in excluding the Fullerton residents and that the distinction was necessary to further its purpose. (Fullerton, supra, 32 Cal.3d at pp. 799-800.)

And because the facts of Fullerton did not, in contrast to those of Lockport, supra, 430 U.S. 259 [51 L.Ed.2d 313], "present[] an intermediate situation [in which] city and noncity residents each had substantial but different interests in the controversy," that federal precedent did not apply. (32 Cal.3d at pp. 800-801.)

As noted, the reasoning of Fullerton, supra, 32 Cal.3d 779, was embodied in a plurality opinion. (6) The case thus lacks authority as precedent (Adoption of Kelsey S. (1992) 1 Cal.4th 816, 841 [4 Cal.Rptr.2d 615, 823 P.2d 1216]; Farrell v. Board of Trustees (1890) 85 Cal. 408, 415-416 [24 P. 868]), and the doctrine of stare decisis does not require us to defer to it (Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41]).

moreover, Fullerton's plurality opinion evinces a great concern that failure to apply

strict scrutiny to the election at issue could result in racial segregation. It acquiesces in but describes as "questionable" an administrative decision that the secession would not promote segregation. (32 Cal.3d at p. 793.) Hence, notwithstanding the agency finding, the plurality found an equal protection violation in part because "the racial and financial impact of that Plan are matters of great concern to the residents who will remain in the Fullerton [high school district]." (Id. at p. 806) in the case at bench the parties have not alluded to any similar racial impact: the impact is purely economic.

The issue in Citizens, supra, 32 Cal.3d 816, was whether the Municipal Organization Act of 1977 (former § 35000 et seq.) constitutionally entitled the state to limit an election to confirm an annexation to residents of the territory to be annexed. The city in question had about 40,000 voters, while the

territory to be annexed had about a quarter as many. The Legislature had provided that although under certain circumstances, applicable in Citizens, the territory's voters must confirm the annexation (former § 35228, subd. (b); see now §§ 57075, subd. (a)(2), 57103, subd (e), the annexing city's voters could also vote to confirm the joinder only if, as relevant to the analysis in Citizen's, the number or registered voters in the territory was 50 percent or more of those in the city. (Former § 35231, subd. (b); see now § 56850.)

Unlike in Fullerton, a bare majority concurred in the reasoning of Citizens. We decided that "the establishment of the legal relationship contemplated in this case, like the dissolution of a legal relationship involved in Fullerton, has a substantial effect upon the residents of both territories involved. We therefore conclude that the relevant geographic confines, for the purpose of constitutional analysis, include [] both the

affected territory and the affected city. We must therefore inquire whether the restrictions ...serve a compelling state interest and are necessary to further that purpose." (Citizens, supra, 32 Cal.3d at p. 824.)

Applying strict scrutiny, we noted that the government may have a compelling interest to limit the vote to those "specially interested in the matter at issue" (Citizens supra, 32 Cal.3d at p. 825, citing Lockport, supra, 430 U.S. 259, and Fullerton, supra, 32 Cal.3e 779). And we concluded the Legislature could determine that when "the number of registered voters is not equal to 50 percent of the city's list, the impact of annexation on the city's treasury or voting rolls is insufficient to require an election in the city. [¶] We find no basis to question the line drawn by the Legislature. To be sure, any quantitative measure is in a sense arbitrary; we cannot say that a compelling interest required drawing a line at the case in which

the territory has voters equal to 50 percent of the city's number instead of 40 percent of 25 percent..." (32 Cal.3d at p. 826.)

We then turned to the least-restrictive-means prong of the strict scrutiny test. (Citizens, supra, 32 Cal.3d at p. 827, quoting Dunn v. Blumstein (1972) 405 U.S. 330, 343 [31 L.Ed.2d 274, 284-285, 92 S.Ct. 995].) We noted that under formed law, city residents enjoyed greater political participating in an annexation decision because the city council had to approve the change of organization. "Thus ...the asserted state interests in avoiding the cost and burden of a city-wide election and the effect of aggregating territorial and city votes were achieved in a manner less restrictive of the political rights of city resident." (32 Cal.3d at p. 827.) But we decided that the state has a compelling interest in permitting unincorporated areas to join cities "even if the city's residents oppose annexation" (ibid.), because the state's

interest in "promoting orderly and logical community development and of providing municipal services to newly urbanized regions" (id. at p. 829) was "of compelling importance," and the state's interest would be thwarted if city residents could veto the annexation (ibid.).

Because Citizens, supra, 32 Cal.3d 816, unlike Fullerton, supra, 32 Cal.3d 779, commanded a majority of this court, it requires our considered reexamination. As we now explain, we conclude in hindsight that the reasoning in that case was questionable.

For one, we now find faulty the holding of Citizens that a compelling interest in excluding less interested potential voters justified city voters' exclusion because the territory to be annexed contained less than half the number of voters residing in the city. (32 Cal.3d at pp. 826-827.) If strict scrutiny is given to an exclusionary voting scheme, the interest of those excluded from the election

must be substantially less than that of those included for the scheme to pass muster. (Evans v. Cornman (1970) 398 U.S. 419, 422-423 [26 L.Ed.2d 370, 374-375, 90 S.Ct. 1752]; Kramer v. Union School District (1969) 395 U.S. 621, 632 [23 L.Ed.2d 583, 592-593, 89 S.Ct. 1886].) It is impossible for us to now reconcile Citizens with the federal high court's prescription. We can no longer conclude that the city residents' interest in the election outcome was so insubstantial for equal protection purposes: the annexation would have increased the city's size by almost one-quarter. A claim of primary or substantial interest "cannot lightly be accepted,: lest "lack of a 'substantial interest' ...mean no more than a different interest..." (Evans v. Cornman, supra, 398 U.S. at pp. 422-423 [26 L.Ed.2d at pp. 374-375].) Citizens accepted the claim too lightly.

Given that conclusion, we also find constitutionally infirm the reliance of

Citizens on the goals of orderly development and provision of municipal services (32 Cal.3d at p. 829) to justify the city voters' exclusion from the election. As mentioned above, Citizens reasoned that the exclusion from the election. As mentioned above, Citizens reasoned that the exclusion was justifiable because the city dwellers might veto the annexation, thereby interfering with those goals. (Ibid.) But if the city residents have a fundamental right to vote, then the state's putative interest in excluding them from voting because they might veto the annexation is constitutionally impermissible. (7) As correctly stated in Fullerton, "It is, of course, clear that the state cannot claim a compelling interest in excluding voters because of how they may vote. (Carrington v. Rash (1965) 380 U.S. 89, 94 [13 L.Ed.2d 675, 679, 85 S.Ct. 775].)" (32 Cal.3d at p. 805.) As Carrington explained, "'Fencing out' from the franchise a sector of the population because of

the way they may vote is constitutionally impermissible." (Carrington v. Rash (1965) 380 U.S. 89, 94 [13 L.Ed.2d 675, 679, 85 S.Ct. 775].)

To the extent that Citizens, supra, 32 Cal.3d 816, is inconsistent with the constitutional principles set forth in this opinion, it is not to be followed.

Of course we do not lightly disagree with a comparatively recent decision of this court. (8) The rule of law commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible. (Payne v. Tennessee (1991) 501 U.S. __ [115 L.Ed.2d 720, 736-737, 111 S.Ct. 2597]; see Akron v. Akron Center for Reproductive Health (1983) 462 U.S. 416, 419-420 [76 L.Ed.2d 687, 696-697, 103 S.Ct. 2481].) Nevertheless, stare decisis compels less deference to precedent when constitutional

principles are applied to deny effect to an enactment. (See Akron, supra, at p. 420 [76 L.Ed.2d at pp. 696-697] [stare decisis "perhaps never entirely persuasive on a constitutional question"].) If we were to follow Citizens, supra, 32 Cal.3d 816, and apply strict scrutiny, we would now be compelled to declare section 57103 invalid on constitutional grounds. Such a holding would greatly unbalance the Legislature's careful accommodation of competing local governmental and private interests in the subsequently enacted Cortese-Knox Act and would undermine the lawmakers' power over the existence of cities and counties. In such circumstances stare decisis carries less weight. (See Payne v. Tennessee, supra, 501 U.S. at p. __[115 L.Ed.2d at p. 737] [stare decisis is not an inexorable command, and less so in constitutional cases in which correction through legislative action is practically impossible]; cf. Quill Corp. v. North Dakota

(1992) 504 U.S. [119 L.Ed.2d 91, 111-112, 112 S.Ct. 1904] [Scalia, J., conc. in part & conc. in judg., quoting Patterson v. McLean Credit Union (1989) 491 U.S. 164, 172-173 [105 L.Ed.2d 132, 147-148, 109 S.Ct. 2363] ("stare decisis has 'special force' where 'Congress remains free to alter what we have done'")].)

(1f) We conclude that under applicable precedent we should apply a deferential standard in evaluating the classification set forth on the face of section 57103. The Legislature's traditional power to regulate the formation of political subdivisions allows it to decide that the county residents living outside the territory to be incorporated have a lesser degree of interest in the proposed incorporation than those within, in which case the classification must be denied effect only if it lacks a rational basis. We turn to that questions in part IV, post.[10]

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[10]Perhaps because of the United States Supreme Court's guidance, no other jurisdiction has ever cited

III.

We have not entirely concluded our inquiry into the standard of deference to be applied to the confirming election, however. As will be recalled, plaintiffs' challenge is to section 57103 as it is applied to them. The Court of Appeal held that the equal protection clause requires Sacramento County's unincorporated-are

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the relevant discussion in Fullerton, supra, 32 Cal.3d 779, or Citizens, supra, 32 Cal.3d 816, with approval. Rather, other courts have also held, implicitly or explicitly, that the rational basis test applies to state legislation to exclude extraterritorial residents from voting on a change of municipal organization. (See City of New York v. State (N.Y. App. Div. 1990) 158 A.D.2d 169 [557 N.Y.S.2d 914] affd. 76 N.Y.2d 479 [561 N.Y.S.2d 154, 562 N.E. 2d 118] [upholding a state law that may allow the borough of Staten Island to separate from New York City under conditions markedly less deferential to the city's interests than is the Cortese-Knox Act to Sacramento County's, and rejecting the reasoning of Fullerton, supra]; see also St. Louis County, Mo. v. City of Town and Country (E.D.Mo. 1984) 590 F.Supp. 731; Moorman v. Wood (E.D.Ky. 1980) 504 F.Supp. 467, 474-475; Givorns v. City of Valley (Ala. 1992) 598 So.2d 1338.)

residents to be able to vote on this question because of the county's singular governmental structure. But the Legislature addressed that concern with a commendable degree of attention to the county's demography.

As we have observed, the Cortese-Knox Act provides for a specially composed local agency formation commission for Sacramento County (§ 56326.5); other counties, also populous but not possessing Sacramento County's unusual governmental structure, receive no special consideration. Moreover, in 1973 the Legislature created an entire chapter of the Government Code (§§ 51900-51953) specifically addressing the effect of Sacramento County's unique circumstances on local government. (§ 51903.) The Legislature in effect urged the voters to adopt a consolidated city-county government similar to that of the City and County of San Francisco. (§ 51902.) We take judicial notice (Evid. Code, § 452, subd. (h) that in November 1990 the voters of Sacramento

County rejected a measure that would have crated such a consolidated city and county.[11] It was thereafter that the Legislature, still striving to accommodate the county's unusual demography (see Stats. 1991, ch. 439, § 2), enacted section 56326.5, giving the county a unique local agency formation commission. Thus the Legislature has recognized the county's uniqueness and has twice attempted to accommodate its residents.

In addition, the facts of this case belie any claim of unusual financial detriment. As noted at the outset, the act's safeguards led to several modifications of the incorporation proposal designed to lessen its fiscal impact on the county. The board calculated that the net loss to the county from the incorporation of Citrus Heights would be some $2.5 million for the first year. The commission assets that

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[11]The unincorporated-area residents of Sacramento County rejected the measure by vote of 119,700 to 76,561.

this loss -- which it believes to be exaggerated -- would amount only to some $5 per unincorporated-area resident. Even using the county's financial data, the commission found the loss would be less than 1 percent of the county's total revue and 3 1/3 percent of its discretionary revenue. The commission impliedly determined that this modest detriment would not bar approving the incorporation plan and submitting it to the voters. And the trial court found that the plan was sufficiently revenue-neutral to survive an abuse-of-discretion challenge, apparently under section 56107. Given the administrative record in this case, we conclude that under any standard of review the trial court's determination was sound.

IV.

(9), (1g) Giving section 57103 the presumption of constitutionality to which every statue is entitled (People v. Sanders (1990) 51 Cal.3d 471, 495 [273 Cal.Rptr. 537 797 P.2d

561]), we conclude that it must be given effect if it bears some fair relationship to a legitimate public purpose. (Plyler v. Doe, supra, 457 U.S. 202, 216 [72 L.Ed.2d 786, 798-799].)

In section 56001 the Legislature announced a policy "to encourage orderly growth and development ...essential to the social, fiscal, and economic well-being of the state," and stated that "the logical formation and determination of local agency boundaries is an important factor in promoting orderly development ...[T]he Legislature further finds and declares that this policy should be effected by the logical formation and modification of the boundaries of local agencies."

The foregoing sufficiently shows a legitimate purpose in enacting section 57103. And we conclude that section 57103 is fairly related to the Legislature's declared purpose, for, if large, relatively disinterested

majorities could veto incorporations decided through the Cortese-Knox Act's elaborate process, the result might well hinder orderly growth and development. Thus there is no invidious discrimination of the type referred to in Lockport, supra, 430 U.S. 259, 268 [51 L.Ed.2d 313, 322-323].

Unlike in Fullerton, supra, 32 Cal.3d 779, which involved a discretionary agency decision to hold an election, the Cortese-Knox Act was constructed with a mighty bulwark against the exercise of arbitrary discretion. The act accommodates competing local governmental and private interests, narrowly channeling the commission's ultimate determination before the territory's voters consider the decision. The election merely asks the affected residents to confirm that they desire self-government. To deny the Legislature the authority to let the potentially incorporating territory's voters have the final say in the matter would be to lessen political participation, not increase

it. we do not believe that result is required by our federal and state Constitutions. As we said in Curtis v. Board of Supervisors (1972) 7 Cal.3e 942, 965-966 [104 Cal.Rptr. 297, 501 P.2d 5378], "The ideal of maximum participation in democratic decision-making particularly applies to participation in the affairs of the city. On e of the most striking and encouraging phenomena of our times has been the deep and renewed interest of citizens in local community matters. To frustrate the endeavor of individuals to fix the unit of their local governance ...would be to stifle that self-determination. The seeds of democracy lay in the Greek city-state; we would be reluctant to stay the fruition of that democratic expression in the city of today. Neither the state nor federal Constitution sanctions such negation..."

We hold that section 57103's limitation does not violate the equal protection clause of the United States or the California

Constitution, either on its face or as applied to this proposed incorporation.

V.

The Court of Appeal's judgment is reversed with instructions to direct the trial court to enter judgment for defendant with respect to the constitutionality of section 57103. The Court of Appeal is to take such further action on the question of attorney fees as this disposition warrants.

In addition, certain plaintiffs, and amici curiae counties of Contra Costa and Santa Cruz, have requested partial publication of that part of the Coar of Appela opinion concerning the California Environmental Quality Act. (Cal. Rules of Court, rules 976(d), 976.1, 978(a).) The request is denied. Denial of a request for publication or partial publication is not to be construed as a reflection on the merits of such an opinion. (See id., rules 978(c), 979(e).)

Lucas, C.J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J.,

concurred.

Supreme Court, U.S.
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No. 92-1672

In The

Supreme Court of the United States

October Term, 1992

JOHN MUSSER,

Petitioner,

v.

PASADENA UNIFIED SCHOOL DISTRICT,
CALIFORNIA STATE BOARD OF EDUCATION,

Respondents.

**On Petition For Writ Of Certiorari
To The California Court Of Appeal,
Second Appellate District**

BRIEF OF RESPONDENT PASADENA UNIFIED SCHOOL DISTRICT IN OPPOSITION

CAROLYN H. CARLBURG, ESQ.
LAW OFFICES OF
CAROLYN H. CARLBURG
540 El Dorado Street
Pasadena, California 91101-2558
(818) 440-9100

*Attorneys for Respondent
Pasadena Unified School District*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20pp

QUESTIONS PRESENTED

1. Whether the California Court of Appeal, in holding that the State Board of Education was subject to strict scrutiny in its determination of the area of election, applied the correct standard of review.

2. Whether the California State Board of Education demonstrated a compelling state interest in limiting the franchise to the electorate of the 71-family transfer area, and excluding the electorate of the Pasadena Unified School District.

3. Whether the California Court of Appeal correctly determined that the limitation of the franchise to the electorate of the 71-family transfer area violated equal protection guarantees.

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PASADENA UNIFIED SCHOOL DISTRICT,
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Respondents.

On Petition For Writ Of Certiorari
To The California Court Of Appeal,
Second Appellate District

BRIEF OF RESPONDENT PASADENA UNIFIED SCHOOL DISTRICT IN OPPOSITION

STATEMENT OF THE CASE

This dispute arises from a petition to the California State Board of Education to transfer territory from the Pasadena Unified School District ("PUSD") to the San Marino Unified School District ("SMUSD"). Forty-seven school age children reside in the transfer area, which

consists of 71-homes located in a portion of an unincorporated area of Los Angeles County. The entire unincorporated territory includes 900 homes, and has been served by the PUSD for more than 70 years.

The same group of homeowners requesting the school territory transfer also filed a petition with the Local Agency Formation Commission ("LAFCO") for annexation of the 71-home area to the City of San Marino. The residents of the remaining 829 homes in the unincorporated area initiated separate annexation proceedings with LAFCO to join the City of San Marino. At the time of the State Board's approval of the petition to transfer, in September, 1990, neither area had been approved for annexation by the City of San Marino. On February 7, 1991, the City of San Marino rejected both petitions for annexation.

In September, 1990, when the petition to transfer was approved, the population of the community served by the PUSD was approximately 55.5% White, 22.4% Black, 15.3% Hispanic and 6.5% Other. The student population of the PUSD was 39% Black, 35% Hispanic, 21% White and 5% Asian and Other. In contrast, the SMUSD was approximately 57.3% White, 39.4% Asian, 2.8% Hispanic, and 0.6% Black and Other.

The PUSD, which operated under a court ordered desegregation program from October, 1970, to October, 1979, and since the latter date has operated under a court approved voluntary desegregation plan, has seen the White student population drop from 57.3% in 1970 to 21% as of September, 1990. Consequently, the transfer was opposed by the PUSD on the grounds that it would

perpetuate the historic pattern of White flight from the racially diverse PUSD. The PUSD further argued that if the transfer were allowed, the entire unincorporated area, of which the subject transfer area is but a small part, would also leave the PUSD by means of similar, numerically insignificant transfer petitions.

On November 1, 1989, the Los Angeles County Committee on School District Organization found that while the criteria in *Education Code* § 35753 were met, there was no compelling reason to approve the transfer. It is noteworthy that the Committee recommended that if the State Board of Education approved the transfer, the election should be held in the PUSD *and* the SMUSD. On June 8, 1990, the State Board denied the petition on the same grounds.

On June 29, 1990, Petitioner herein, John Musser, requested a rehearing of the petition to transfer. Hearings on the request for a rehearing and on the merits of the petition were conducted on September 13-14, 1990. The State Board of Education granted a rehearing, approved the petition, and limited the election on the transfer to the voters in the transfer area.

The State Board's decision to limit the election to only those voters residing in the transfer area rested on the conclusion that, "the area under petition would probably be overwhelmed by a much larger number of uninterested or incidentally interested voters" in the PUSD and the SMUSD, and that, "there is a compelling state interest in reducing the area of election to the area proposed to be transferred." The State Board's decision was largely influenced by the assumption that the number of

students actually enrolled in the PUSD would be the same number of students transferred to the SMUSD [3 of 47 students residing in the transfer area], and that the impact of such a student transfer would be negligible. Thus, the State Board concluded that the voters in the PUSD and the SMUSD had no substantial interest in the matter.

Following the State Board's reversal of its prior decision denying the petition, the PUSD sought a writ of mandate in the Los Angeles Superior Court pursuant to *Code of Civil Procedure* § 1085. On February 19, 1991, the Honorable Ronald M. Sohigian denied the petition, dismissing the PUSD's claims regarding the severe isolation of racial minorities in the PUSD, and the further claim that the proposed transfer would perpetuate a historic trend of racial segregation in the PUSD. Judge Sohigian also rejected the PUSD's claim that the decision restricting the election to the transfer area was impermissibly based on the conclusion that the votes of those residents would be "overwhelmed" by the votes of the entire PUSD and SMUSD, and thus violated equal protection guarantees.

On February 28, 1991, the PUSD filed a Notice of Appeal of the trial court's decision denying the petition for a writ of mandate. The PUSD also sought a writ of supersedeas to enjoin the election in the transfer area from going forward pending the appeal. The petition for the writ of supersedeas was denied, and on March 5, 1991, the residents of the 71-homes in the transfer area voted overwhelmingly to leave the PUSD and join the SMUSD.

In an opinion issued on February 6, 1992, the Court of Appeal for the Second Appellate District reversed the

decision of the trial court denying the petition for writ of mandate. The Court of Appeal determined that the exclusion of qualified voters within the PUSD was subject to strict scrutiny, and rejected the contention that the voters in the PUSD were disinterested in the transfer. *Pasadena Unified School District v. State Board of Education*, 9 Cal.App.4th 767, 4 Cal.Rptr.2d 532 (1992). The court further held that the interests of the voters in the PUSD in retaining a declining White student population could not be dismissed as insubstantial. 9 Cal.App.4th at 778.

On February 21, 1992, Petitioner sought a rehearing in the California Court of Appeal, Second Appellate District. The request for a rehearing was denied on February 28, 1992.

On March 17, 1992, Petitioner filed a Petition for Review in the California Supreme Court. The petition was granted on April 23, 1992, but review was stayed by order of the Court, pending its decision in the related case of *Sacramento County Board of Supervisors, et al. v. Sacramento Local Agency Formation Commission, et al.*, 3 Cal.4th 903, 13 Cal.Rptr.2d 245, 838 P.2d 1198 (1992). The issue in that case was whether an election on an incorporation of a portion of Sacramento County territory could be constitutionally limited to the incorporating electors.

On November 17, 1992, the California Supreme Court rendered its decision in the *Board of Supervisors* case, upholding under the rational basis test the constitutionality of the State statute [*Government Code* § 57103] limiting the franchise to the electors in the incorporating area, and finding no violation of equal protection guarantees. However, as will be explained hereinbelow, the

Court's decision included two (2) critical distinctions between that case and the case at bar. Consequently, the decision in the *Board of Supervisors* case was not binding upon the Court in its subsequent deliberations in this case. On December 17, 1992, the Court dismissed Petitioner's request for review.

ARGUMENT

I.

THE CALIFORNIA COURT OF APPEAL CORRECTLY APPLIED THE STRICT SCRUTINY TEST TO THE DECISION OF THE STATE BOARD OF EDUCATION, LIMITING THE FRANCHISE TO THE ELECTORATE OF THE TRANSFER AREA

The threshold issue is whether the Court of Appeal correctly applied strict scrutiny to the State Board's decision limiting the franchise to the transfer area, and excluding the electorate of the existing governmental entity [PUSD] from which the territory would be transferred. The decisions of this Honorable Court and the California Supreme Court strongly indicate that the Court of Appeal applied the correct standard of judicial review. *See, Bullock v. Carter*, 405 U.S. 134, 144, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972), *Cipriano v. City of Houma*, 395 U.S. 701, 706, 23 L.Ed.2d 647, 89 S.Ct. 1987 (1969), *Phoenix v. Kolodziejski*, 399 U.S. 204, 26 L.Ed.2d 523, 90 S.Ct. 1990 (1970), *Kramer v. Union School District*, 395 U.S. 621, 626-632, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969), and *Fullerton Joint Union High School District v. State Board of Education*, 32 Cal.3d 779, 799, 187 Cal.Rptr. 398, 654 P.2d 168 (1982). *See also, San Dieguito Union High School District v.*

Rosander, 171 Cal.App.3d 968, 978, 217 Cal.Rptr. 737 (1985), and *Hawn v. County of Ventura*, 73 Cal.App.3d 1009, 1018, 141 Cal.Rptr. 111 (1977). In each of the cited cases, the courts applied the strict scrutiny test to the exclusion of qualified voters within an existing governmental entity of general jurisdiction, and invalidated the exclusion on equal protection grounds.

II.

THE CALIFORNIA STATE BOARD OF EDUCATION FAILED TO SHOW A COMPELLING STATE INTEREST IN LIMITING THE FRANCHISE TO THE ELECTORATE OF THE TRANSFER AREA, AND EXCLUDING THE ELECTORATE OF THE PASADENA UNIFIED SCHOOL DISTRICT

In *Kramer v. Union School District, supra*, 395 U.S. at 626, this Honorable Court determined that,

> ". . . . [W]e must give the statute a close and exacting examination. '[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' (Citations omitted.)"

The State may avoid the strict scrutiny of equal protection if the classification or designation of election territory has only minimal, if any, effect on the fundamental right to vote. *Fullerton Joint Union High School District v. State Board of Education, supra*, 7 Cal.3d at 799; *Kramer v. Union School District, supra*, 395 U.S. at 632; *Evans v. Cornman*, 398 U.S. 419, 422-423, 26 L.Ed.2d 370, 90 S.Ct. 1752 (1970).

Petitioner's contention on this issue is that because of the small number of school age children (47) in the transfer area (71 homes), and the even smaller number (3) of students actually attending PUSD schools, there is no substantial impact on the electoral process. But Real Party's analysis misperceives the substantial impact rule. It is what the exclusion does to the **process** that is the issue. If the exclusion lacks constitutional integrity because of its unequal effect on similarly situated voters, it has a real and appreciable impact on the electoral process. Put another way, if interested voters are excluded and disinterested voters are included, the classification cannot pass constitutional muster. *Kramer v. Union School District, supra,* 395 U.S. at 632.

Respondent acknowledges that there is authority for the proposition that the state may, **in a proper case,** exclude qualified voters whose interest in the outcome of the election is **di minimus,** or peripheral. However, the overwhelming body of authority has been reluctant to discount the interests of a particular class of voters on the grounds that their interest is **di minimus.** *Kramer v. Union School District, supra,* 395 U.S. 621 (exclusion of single adult without children struck down); *Cipriano v. City of Houma, supra,* 395 U.S. 701 (Louisiana property taxpayer limitation on franchise violates equal protection clause); *Phoenix v. Kolodziejski,* 399 U.S. 204 (Arizona property taxpayer limitation on franchise struck down); *Westbrook v. Mihaly, supra,* 2 Cal.3d 765, 837 Cal.Rptr. 839, 471 P.2d 487 (1970) (super majority voting requirement held invalid, the Court defining its task as deciding whether "the challenged provision is compatible with the

demands of equal protection as they apply in contemporary society"); *Curtis v. Board of Supervisors, supra,* 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972) (landowner veto on incorporation protest held invalid on equal protection grounds); *Choudhry v. Free, supra,* 17 Cal.3d 660, 131 Cal.Rptr. 654, 552 P.2d 438 (1976) (*Water Code* § 21100 requiring director of irrigation district to be freeholder invalid on equal protection grounds); *Fullerton Joint Union High School District, supra,* 32 Cal.3d 779 (exclusion of voters in Fullerton High School District from voting on secession of Yorba Linda held invalid on equal protection grounds); *Hawn v. County of Ventura, supra,* 73 Cal.App.3d 1009 (exclusion of non-city voters in the county from voting on location of airport held invalid on equal protection grounds); *San Dieguito Union High School District v. Rosander, supra,* 171 Cal.App.3d 968 (exclusion of electors in high school district from vote on withdrawal of elementary high school district invalid under equal protection clause).

In the instant case, there are 47 school age children residing in the 71-home transfer area. Axiomatically, not every household in the transfer area has a child who will be effected by the transfer. Indeed, almost one third (1/3) of the homes transferred would apparently be uneffected. As to those families, there can be no "primary" interest. Nor can there be any presumption made about the significance of their interests as compared to the interests of the qualified electors excluded from voting by the State Board's decision. Consequently, the subject exclusion of eligible electors in the PUSD, and in the remaining unincorporated area, as well as the entire SMUSD, fails to

demonstrate "sufficient precision" to survive the "exacting scrutiny" which the law requires. *Kramer v. Union School District, supra,* 395 U.S. at 632.

III.

THE CALIFORNIA COURT OF APPEAL CORRECTLY DETERMINED THAT THE LIMITATION OF THE FRANCHISE TO THE 71-FAMILY TRANSFER AREA VIOLATES EQUAL PROTECTION GUARANTEES

In finding that the designation of the election area violates equal protection guarantees, the Court of Appeal reasoned as follows:

> With commendable candor, Pasadena Unified School District appropriately acknowledges that the instant secession, per se, would represent no significant financial impacts and it is unlikely the loss of the small number of students directly involved would have a substantial effect upon either curriculum or facilities. Nevertheless, the racial impact upon the whole would be significant; immediately upon morale, and in the future when this reorganization would serve as a model against the acute social problems of its predominantly minority district. Today segregation is more apt to occur in nibbles than gulps.
>
> It is true that at least some of the Greenwood Addition residents would be more sharply affected at the outset, since those with children would be able to enroll them in the public schools in the San Marino School District. However, the other residents of the Pasadena Unified School District concerned with their

public schools might feel the loss of that territory and the undermining of historic efforts to integrate the district more strongly than do the residents of the Greenwood Addition who have no school-aged children or whose children would continue to attend private schools.

We do not doubt that the interests of the residents of the Greenwood Addition and those of the Pasadena and San Marino Unified School Districts coincide to the extent that they all desire the greatest possible educational opportunities for their children. That they may take opposing positions regarding the transfer does not mean that any group of voters is merely selfish or disinterested, but only that different interests are at stake. The fact that the Pasadena Unified School District's includes a desire to retain a declining White student base is not a reason to disenfranchise its citizenry. Consequently, we find the holding of the court in *Fullerton Joint Union High School District v. State Board of Education, supra,* 32 Cal.3d at page 806, equally apposite here:

"In sum, we do not view the classification at issue here as one which separates interested and uninterested voters, but one which divides two groups, each with a substantial although different interest in the election. In such a case the state has no compelling interest to grant the franchise to one group and deny it to the other. We therefore conclude that the decision of the State Board, to the extent it excluded [Pasadena Unified School District] residents from voting at the election to approve the proposed secession

> of [the Greenwood Addition] from the [Pasadena Unified School District], denied such residents the equal protection of the laws." 9 Cal.App.4th at 778.

The Court's reasoning finds substantial support in, and is consistent with, the *Board of Supervisors* decision. There, the California Supreme Court, in an opinion written by Justice Mosk, upheld the constitutionality of § 57103 of the California *Government Code* against a challenge on equal protection grounds. The Court held that the proper standard of judicial review was the rational basis test. There were two (2) bases for the Court's determination on the issue. First, the Court gave great weight to the fact that the statute limiting the area of election to the incorporating electors was grounded in "the state's plenary power to oversee and regulate the formation of its political subdivisions, and the same power entitles the state to identify as differing in degree the interests of those who may vote under § 57103 and those who may not." 3 Cal.4th at 914. In the case at bar, there is no statute that **requires** limitation of the area of election.

In this same regard, the Court recognized in The Knox Cortese Act of the California *Government Code* [56000 *et seq.*] a "labyrinthine" process containing elaborate safe-guards designed to protect the political and economic interests of affected local governments, residents, and landowners. *Board of Supervisors, supra,* 3 Cal.4th at 912. Here, the statute at issue gives the State Board, an appointed body, **discretion** to decide the area of election.

Furthermore, the Court expressly noted that there were *no* racial impacts before it. In this regard, the Court wrote that:

> Moreover, *Fullerton*'s plurality opinion evinces a great concern that failure to apply strict scrutiny to the election at issue could result in racial segregation. It acquiesces in but describes as "questionable" an administrative decision that the secession would not promote segregation. (32 Cal.3d at p. 793) Hence, notwithstanding the agency finding, the plurality found an equal protection violation in part because "the racial and financial impact of that Plan are matters of great concern to the residents who will remain in the Fullerton [high school district]." 3 Cal.4th at 918.

The *Board of Supervisors* decision [3 Cal.4th at 916] of the California Supreme Court follows the decision of this Honorable Court in *Lockport v. Citizens for Community Action*, 430 U.S. 259, 51 L.Ed.2d 313, 97 S.Ct. 1047 (1977). There, the rational basis test was applied to a New York State statute that forbade the implementation of a new Niagra County charter unless approved by concurrent majorities of both the city and non-city residents of the county. Based on the "realities of the distribution of governmental power in New York, and "the wide discretion the states have in forming and allocating governmental tasks to local subdivisions", this Honorable Court held that the classification did not violate equal protection guarantees.

In effect, the California Supreme Court acknowledged that cases involving the exclusion of qualified voters *and* racial impacts are properly subject to greater scrutiny. In so doing, the Court approved the reasoning of the Court of Appeal in the instant case that, "[w]hile we do not agree with the view of a transfer which might

provide a blueprint for the flight of other predominantly White neighborhoods, neither are we able to say the decision was necessarily arbitrary, capricious, or without evidentiary support." 9 Cal.App.4th at 795.

IV.

THIS CASE RAISES NO FEDERAL ISSUE OF GENERAL IMPORTANCE THAT WARRANTS REVIEW BY THIS HONORABLE COURT

The issues of law raised by the instant petition for certiorari are well settled. The level of review, where the right to vote is at stake, and an existing governmental entity is "carved up", is strict scrutiny. *Wesberry v. Sanders, supra,* 376 U.S. 1, 17 (1964); *Kramer v. Union School District, supra,* 395 U.S. 621, 632; *Bullock v. Carter, supra,* 405 U.S. 134, 144; *Cipriano v. City of Houma, supra,* 395 U.S. 701, 706; and *Phoenix v. Kolodziejski, supra,* 399 U.S. 204.

The decision of the Court of Appeal *follows* settled law in terms of the level of review and its analysis of the issues. The Court's determination that the State Board of Education had no compelling interest in "granting the franchise to one group and denying it to the other" raises no issue worthy of review by this Honorable Court.

V.

CONCLUSION

For each of the foregoing reasons, the PUSD respectfully opposes the instant petition for certiorari, and asks that it be denied.

Respectfully submitted,

CAROLYN H. CARLBURG, ESQ.
LAW OFFICES OF
CAROLYN H. CARLBURG
540 El Dorado Street
Pasadena, California 91101-2558
(818) 440-9100

Attorneys for Respondent
Pasadena Unified School District

REPLY

BRIEF

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-1672

In The

Supreme Court of the United States

October Term, 1992

JOHN MUSSER,

Petitioner,

v.

PASADENA UNIFIED SCHOOL DISTRICT,
CALIFORNIA STATE BOARD OF EDUCATION,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

REPLY BRIEF OF PETITIONER, JOHN MUSSER, TO BRIEF OF RESPONDENT PASADENA UNIFIED SCHOOL DISTRICT IN OPPOSITION

STANWOOD SMITH – LAWYERS
CLIFTON S. SMITH, JR.
611 West Sixth Street
20th Floor
Los Angeles, California 90017
(213) 623-1059

Counsel for Petitioner
John Musser

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

Respondent, the Pasadena Unified School District ("PUSD") opposes the right of 126 voters in 71 homes containing 47 school-age children (the "Transfer Territory") to transfer their homes to the adjacent San Marino Unified School District ("SMUSD"), as ordered by the California State Board of Education, unless 109,000 voters of the entire 21,600 student PUSD vote in a one-time ratification election. That election is the final step in an arduous, multi-level hearing process during which PUSD and the Petitioner presented their cases at **seven** public hearings. The process was concluded by the granting of Petitioner's petition by the California State Board of Education, which is vested by California law with the authority to determine such matters (subject to the final ratification vote of the residents affected).[1]

The Superior Court below found that the non-Transfer Territory voters had no interests at stake in this ratification election and upheld the State Board of Education's decision to limit the election territory to the Transfer Territory voters. The California Court of Appeal reversed holding that the transfer itself had a "racial impact" on the PUSD and ordered the election expanded to include the 109,000 voters of the entire PUSD, but otherwise upheld the transfer (as though a vote can render a supposedly adverse "racial impact" constitutionally acceptable).

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[1] The eleven members of the California Board of Education are appointed by the Governor and must be confirmed by the California State Senate.

The Opposition Brief of Respondent, by omission, targets the precise reason this case should be heard by this Court: Whether **any** facts must be shown by a litigant to exist before a court will overturn a quasi-legislative decision on constitutional grounds? In this case, no facts exist which can support the conclusion of the California Court of Appeal that the interest of racial balance is at risk, implicated, compromised, or involved in any way. The *claim* of race was made by the PUSD. *No facts* were ever shown to sustain that claim. The only facts showed that the presence or absence of this tiny territory has *no measurable impact* on the PUSD, racial or otherwise.[2] Thus, no demonstrable link exists between the interests of the non-Transfer Territory voters and the election in question. The Court of Appeal is wrong and this Court should correct the error.

I.

THE "RACIAL IMPACT" OF THE PROPOSED TRANSFER, RELIED ON BY THE COURT OF APPEAL TO STRIKE DOWN AN INTERNAL BOUNDARY DECISION OF THE STATE OF CALIFORNIA, IS *AT MOST* A 00.1527% "IMPACT."

This Court, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, at 16, 91 S.Ct. 1267 at 1276 (1971) held:

> . . . [J]udicial powers may be exercised only on the basis of a constitutional violation. . . .

---

[2] PUSD conceded the absence of any impact on its financial condition, attendance, curriculum or facilities resulting from the transfer.

In this case, there was no constitutional violation by the California State Board of Education on which to predicate the exercise of judicial power.

The issue can rightly be called the "00.1527% question." Despite the constitutional rhetoric of the PUSD and the Court below, the facts here are compelling but simple: PUSD has 21,600 students. 21% are white (4,536 white students). The Transfer Territory has 47 school-age children, 70% of whom are white (33 white school-age children).[3] Of the total PUSD population, the Transfer Territory white children would represent only 00.1527% of the student population if they attended PUSD schools. **Fifteen one-hundredths of a percent is a constitutional case?** That is why this case should be reviewed by this Court. The California Court of Appeal has invoked the Fourteenth Amendment to the United States Constitution to overturn a legitimate action of the State of California – regulating the boundaries of its **own** political subdivisions – on the basis of "racial impact" where that impact is fifteen one-hundredths of a percent. That sort of judicial activism should not be permitted.

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[3] Only two white children attended PUSD schools at the inception of this process in 1988; no children of any race now attend PUSD schools from the Transfer Territory.

II.

PUSD IGNORES THE NEED TO ESTABLISH A PERSON'S "INTEREST" IN AN ELECTION BEFORE THAT PERSON MUST VOTE.

PUSD necessarily argues that any election held within the boundary of a particular political subdivision of a state must include all of the electors of that subdivision, unless limiting the vote to a smaller territory survives "strict scrutiny." Petitioner and the Superior Court judge below submit that a preliminary step to such a conclusion is a finding that *all the electors of the subdivision have a* ***substantial interest*** *in the* ***outcome*** *of that election in order to vote.* Respondent would have this court eliminate the need to identify that substantial interest because the voters the PUSD wants included simply do not have such an interest.

PUSD's Opposition Brief, at page 8, clearly demonstrates this crucial difference between its position and Petitioner's position:

> Petitioner's contention on this issue is that because of the small number of school age children (47) in the transfer area (71 homes), and the even smaller number (3) of students actually attending PUSD schools, there is no substantial impact on the electoral process. . . . It is what the exclusion does to the **process** [emphasis in original] that is the issue. . . . If the exclusion lacks constitutional integrity because of its unequal effect on similarly situated voters, it has a real and appreciable impact on the electoral process. . . .

This case is **not** about the "process." It is about who has an interest in the first place. Petitioner submits that the "process" is not implicated if the non-voters' interests aren't affected by the outcome of the election. This is not the case of "similarly situated voters." The Transfer Territory voters are interested; the non-Transfer Territory voters are disinterested. Neither the PUSD nor the Court of Appeal can find facts which show that the non-voters have an interest in this election.

The "interests" of the Transfer Territory voters include: the district in which they reside (non-Transfer Territory voters remain where they are – no change); who will be their elected school district officials (non-Transfer Territory voters will retain the same representatives – no change); whether to be subject to the SMUSD school district parcel tax (non-Transfer Territory voters will not be subject to such a tax – no change); whether to approve future funding for the schools **in their district** (non-Transfer Territory voters will vote when and if asked to approve financing for their district – no change).

There is not one single **fact** affecting non-Transfer Territory voters to which Respondent can point which is changed, amended, altered, affected, touched, implicated or modified in any way by this proposed election. PUSD and the California Court of Appeal have simply begged the question that the non-Transfer Territory voters have a "substantial interest." (Unless, of course, one subscribes

to the theory that a 00.1527% impact on school attendance is a "substantial impact."[4])

The cases cited by the PUSD in its Opposition Brief support Petitioner's position. In each of those cases, a demonstrable link existed between each voter's interest and the outcome of those elections. *See*, cases cited and discussed by Respondent at pages 8 and 9 of its Opposition Brief. There is no such link in this case.

Instead, PUSD attempts to hide its lack of facts behind the desegregation history of the PUSD. That history is not implicated by this proposed transfer because the racial makeup of the PUSD is not affected. PUSD also makes much of the racial makeup of the district, as told in racial percentages. If PUSD wants to cite percentages, let's cite percentages:

Percentages	PUSD Before Transfer	PUSD After Transfer
Black	39%	39%
White	21%	21%
Hispanic	35%	35%
Asian/Other	5%	5%
Attendance	21,600	21,600

So just exactly where is the "racial impact" which justifies judicial intervention on constitutional grounds?

---

[4] This Court recently required a much higher threshhold showing of "racial impact" before a Court would intervene. (*See, Freeman v. Pitts*, ___ U.S. ___, 112 S.Ct. 1430 at 1438 (1992). Percentages discussed ranged from 27% to 90%; non-black minority population of "[not] even one percent" noted.)

This transfer makes no discernible impact one way or another on PUSD's racial and ethnic makeup. Yet it is precisely that supposed "impact" which justified the Court of Appeal's intrusion on U.S. Constitutional grounds into California's quasi-legislative process.

The PUSD also tries to characterize these 71-homes as a "white enclave," obviously because such a characterization conjures up an image of isolated privilege amidst a sea of "poor people of color." That is simply not the case.

The truth is that these three blocks are *racially indistinguishable* from mile after mile of adjacent PUSD *and* San Marino Unified School District neighborhoods, stretching in every direction. These 71-homes are simply a small handful of people in the middle of an 8,863,164 population county whose homes happen to be closer to the schools of the SMUSD than the PUSD.

Petitioner and his fellow residents simply would like the opportunity to let their children walk to school.

III.

THIS COURT HAS AN INTEREST IN INSURING THAT ALLEGATIONS OF "RACIAL IMPACT" WHEN USED TO SUPPORT JUDICIAL INTERVENTION INTO LEGISLATIVE MATTERS ARE BASED ON FACT.

Never in the course of this case has the PUSD been able to establish any rational connection between the racial makeup of its student population and the election at issue here.

Petitioner could locate no cases involving schools, desegregation, voting rights, antitrust, copyright, or anything else (except scientific measurement of toxics in environmental cases and DUI cases) where **fifteen one-hundredths of one percent** justified judicial intervention into anything. Such a meaningless threshhold for judicial intervention into quasi-legislative functions of a state agency acting pursuant to its authorizing statutes should be unacceptable to this Court.

IV.

THE CALIFORNIA STATE BOARD OF EDUCATION ACTED LAWFULLY AND CONSTITUTIONALLY IN ESTABLISHING THE ELECTION TERRITORY; NOTHING CITED BY THE COURT OF APPEAL OR RESPONDENT JUSTIFIED JUDICIAL INTRUSION INTO THIS PROCESS.

The state of California did not delegate to its residents the power to veto or ratify every minor boundary adjustment. California did, however, give everyone, whether interested or not, the right to appear and be heard in the process now before the Court. PUSD was heard **seven times** and lost. The power to fix boundaries of its political subdivisions rightfully belongs to the California legislature and the agencies to which the legislature has delegated that authority. The California State Board of Education properly applied the law. The California Court of Appeal and the PUSD have failed to show any facts which justify court intervention in this legislative/quasi-legislative process.

This Court should reestablish the "wall of separation" between court and legislature when it comes to

adjusting political subdivision boundaries in California, or at least demand that inferior courts limit their intervention to cases in which allegations of constitutional failings of agencies are supported by some facts. A maximum theoretical racial impact of 00.1527% is not a "fact" on which the exercise of judicial power should be based. Because the area of race is so sensitive, it is increasingly incumbent upon this Court to demand that all courts limit the exercise of their powers to governmental acts which really do have an impact. The mere accusation of "race" has been in this case every bit as damning to the Petitioner as if it were true, when it is not.

CONCLUSION

This Court should rule that before a litigant can succeed on the basis of an allegation of "racial impact" (which is the entire foundation of PUSD's and the Court of Appeal's position), that litigant must first establish facts which demonstrate that a racial issue exists. There are no such facts here.

Unless a 00.1527% theoretical impact on the racial makeup of the PUSD student body is "substantial" for constitutional purposes, the non-Transfer Territory voters of the PUSD have *no interest in this election*. Their inclusion violates John Musser's right to equal protection. This Court should grant a Writ of Certiorari to make clear that judicial intrusion, on racial grounds, into the plenary authority of a state and its agencies to fix the boundaries

of its internal subdivisions constitutionally requires more than a 00.1527% theoretical impact.

May 28, 1993

Respectfully submitted,

STANWOOD SMITH – LAWYERS
CLIFTON STANWOOD SMITH, JR.
611 West Sixth Street, 20th Floor
Los Angeles, California 90017
(213) 623-1059

Attorneys for Petitioner
John Musser